REPORTS OF CASES

DECIDED BETWEEN

JULY 17, 1987 and DECEMBER 3, 1987

IN THE

Supreme Court of Nebraska

VOLUME CCXXVI

TRINA SOLLARS

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By Trina Sollars, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. BA-005: **Bar Application on Appeal of Theobald.** By order of the court, Nebraska State Bar Commission ruling affirmed; application of Theobald denied.

No. 82-293: **Gottsch v. Churchill.** By order of the court, case dismissed pursuant to order to show cause issued on October 26, 1987.

No. 83-810: **First National Bank & Trust v. Lewandowski.** By order of the court, case dismissed pursuant to order to show cause issued on October 26, 1987.

No. 86-037: **In re Conservatorship of Koelling.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-181: **Todd v. Todd.** Stipulation allowed; appeal dismissed.

No. 86-241: **Weiner v. State ex rel. Real Estate Commission.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 86-300: **Grand Island Mall v. Shirley.** Stay of bankruptcy lifted; motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 86-448, 86-449: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-485: **Dinnel v. Todd.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-535: **Burney v. Settles.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-664: **White v. Schrack.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-803: **Center State Bank v. Dana, Larson, Roubal & Assoc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-827: **Hansen v. Hansen.** Stipulation of settlement approved; cause remanded to the district court with directions

to dismiss.

No. 86-903: **Ward v. Ward.** Stipulation allowed; appeal dismissed.

No. 86-912: **Jenkins v. State.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-977: **State v. Rosenkrans.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-994: **In re Interest of Crawford.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 86-1004: **McGowen v. Smith.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-1022: **Farmland Industries, Inc. v. State Board of Equalization.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-1033: **Midwest Bridge and Constr. v. Village of Brainard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-1036: **Federal Land Bank of Omaha v. Nelson.** By order of the court, stay of bankruptcy lifted. Stipulation allowed; appeal dismissed.

No. 86-1040: **State v. Meints.** Judgment affirmed; see Rule 7A.

No. 86-1053: **Commercial State Bank of Wausa v. Rosberg.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1073: **State v. Nottlemann.** Judgment affirmed; see Rule 7A.

No. 86-1077: **Taylor v. Travelers Insurance Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-1081: **State v. Sager.** Judgment affirmed; see Rule 7A.

No. 86-1089: **George v. Georges.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-001: **O'Donnell v. Bruckman Rubber.** Stipulation

allowed; appeal dismissed with prejudice.

No. 87-002: **Hansen v. Hansen.** Stipulation of settlement approved; cause remanded to the district court with directions to dismiss.

No. 87-040: **State v. Morse.** Judgment affirmed; see Rule 7A.

No. 87-041: **State v. Ross.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-053: **State v. Shaddy.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-091: **Hansen v. Weddington.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-109: **Pegram v. Mahar.** Stipulation allowed; appeal dismissed.

No. 87-114: **Dederman v. Hopco, Inc.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-115: **State v. Scott.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 87-118: **The Travelers Insurance Co. v. Wynne.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-121: **State v. Boner.** Stipulation allowed; appeal dismissed.

No. 87-133: **Johnson v. Haley.** Joint motion of the parties to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 87-144: **State v. Derby.** Motion of appellee for summary affirmance or dismissal denied; count I of information set aside; matter remanded to trial court for postconviction evidentiary hearing on count II.

No. 87-153: **Sladek v. Clearwater Development Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-164: **State v. Zimmerman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-172: **State v. Green.** Judgment affirmed; see Rule 7A.

No. 87-173: **State v. Moore.** Judgment affirmed; see Rule

7A.

No. 87-187: **Lacy v. Young.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-202: **State v. Tvrdy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-207: **State v. Lewis.** Judgment affirmed; see Rule 7A.

No. 87-208: **State v. Vaughn.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-210: **Haas v. Haas.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-215: **State of Iowa ex rel. Crawford v. Andrews.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-225: **Weigel v. Nebraska Food Corp.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-227: **Lutes v. Rinne.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-230: **State v. Turner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-234: **State v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-242: **State v. Lawson.** Judgment affirmed; see Rule 7A.

No. 87-243: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-244: **State v. Lehman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-247: **State v. Scarborough.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-251: **Regency Homes Assn. v. Theisen.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-269: **Theel v. George A. Hormel & Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-270: **Hurt v. Hurt.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 87-277: **State v. Randall.** Judgment affirmed; see Rule 7A.

No. 87-278: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-279: **State v. Darling.** By order of the court, appeal dismissed for failure to file briefs.

Nos. 87-285, 87-286, 87-360: **State v. Schneider.** Judgment affirmed; see Rule 7A(1).

No. 87-287: **State v. Raszler.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-288: **Luna v. Grammer.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-290: **Spilinek v. Jacobsen.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-291: **State v. Kline.** Judgment affirmed; see Rule 7A.

No. 87-292: **State v. Pendley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-293: **State v. Purdy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-300: **Norwest Bank Nebraska v. Yager.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-306: **State v. Gibson.** Judgment affirmed; see Rule 7A.

No. 87-313: **State v. Schafer.** Judgment affirmed; see Rule 7A.

No. 87-317: **Racicky v. J.I. Case Co.** Stipulation allowed; appeal dismissed.

No. 87-318: **Bittner v. Hinky Dinky Stores.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-320: **State v. Shaffer.** Judgment affirmed; see Rule 7A.

No. 87-328: **State v. Holthaus.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-341: **State v. Colter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-347: **Mortensen v. Lynch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-351: **Wood v. Gering National Co.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-355: **State v. Erb.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-356: **Wittmersehouse v. Noonan.** Stipulation allowed; appeal dismissed.

No. 87-361: **State v. Mahan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-365: **Harris v. Orr.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 87-367: **State v. Erb.** Stipulation allowed; appeal dismissed.

No. 87-369: **State v. Utigard.** By order of the court, judgment affirmed; see Rule 7A.

No. 87-377: **Langan v. Douglas & Lomason Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-378: **Department of Banking & Finance v. Zelen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-381: **State v. Belford.** Judgment affirmed; see Rule 7A.

No. 87-384: **Jefferson v. Dept. of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-394: **Grand Island Post No. 53 v. Rasmussen.** Stipulation allowed; appeal dismissed.

No. 87-396: **State v. Winters.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-397: **State v. Walker.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-398: **State v. Caldwell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-399: **State v. Caldwell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-400: **State v. Petet.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-401: **Price v. Baker's Supermarkets.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-405: **County of Douglas v. Godinez.** Stipulation allowed; appeal dismissed at cost of appellant.

Nos. 87-408, 87-429, 87-431: **Aupperle Plumbing and Heating v. Lecher Constr. Co.** Stipulation allowed; appeal dismissed.

No. 87-409: **In re Estate of Stubbert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-415: **State v. Mercer.** Judgment affirmed; see Rule 7A.

No. 87-416: **State v. Mercer.** Judgment affirmed; see Rule 7A.

No. 87-418: **Milos v. Milos.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-419: **Ellis v. Jensen.** Stipulation allowed; appeal dismissed.

No. 87-420: **State v. Hill.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-421: **State v. Scott.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-423: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-424: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-428: **Witherspoon v. Sides Constr. Co.** By order of the court, appeal dismissed for lack of a final order as to both

appellants.

No. 87-432: **Frickel v. Campbell's Soup Co.** Stipulation allowed; appeal dismissed.

No. 87-436: **State v. Hass.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-437: **State v. Templeton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-440: **State v. Cole.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 87-441: **Schukert v. Westerbuhr.** Stipulation allowed; appeal dismissed without prejudice.

No. 87-444: **State v. Schoffner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-445: **State v. Holthus.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-447: **State v. Winslow.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-448: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-453: **Sommerhalder v. Breckel.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-457: **State v. Addison.** Judgment affirmed; see Rule 7A.

No. 87-459: **State v. Jackson.** Judgment affirmed; see Rule 7A.

No. 87-461: **Beeler v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-463: **Yellow Boy v. Dept. of Social Services.** Stipulation allowed; appeal dismissed.

No. 87-465: **State v. Reyes.** Judgment affirmed; see Rule 7A.

No. 87-470: **State v. Pearce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-472: **Schroeder v. Mettenbrink.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-473: **In re Estate of Mettenbrink.** Stipulation allowed; appeal dismissed.

No. 87-478: **DeKay v. Spilger.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-484: **Carter v. Gunter.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-485: **State v. Chrans.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-487: **Sioux City Foundry Co. v. Black.** Stipulation allowed; appeal dismissed.

No. 87-488: **State v. Markley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-489: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-490: **State v. McCain.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-493: **Martin v. State ex rel. Real Estate Commission.** By order of the court, appeal dismissed.

No. 87-496: **Weatherly v. Wilson.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-502: **State v. Stacy.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-505: **State v. Sohl.** Judgment affirmed; see Rule 7A(1).

No. 87-508: **State v. Mason.** Stipulation allowed; appeal dismissed.

No. 87-509: **Rolling v. Rolling.** By order of the court, appeal

dismissed; see Rule 7A.

No. 87-512: **State v. O'Donnell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-514: **State v. Soule.** Judgment affirmed; see Rule 7A(1).

No. 87-519: **Adams Bank & Trust v. Wilson.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-525: **State v. Morimoto.** Judgment affirmed; see Rule 7A.

No. 87-526: **State v. Russell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-527: **Smith Z Two Bar, Ltd. v. Dept. of Roads.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-532: **Widga v. Sandell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-533: **Farmland Service Co-op v. Martin.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-535: **State v. Divine.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-538: **State v. Whigham.** Judgment affirmed; see Rule 7A.

No. 87-541: **Pickering v. Pickering.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-548: **Pauly v. Uhrich.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-549: **Scottsbluff Production Credit Assn. v. Jessen.** Stipulation allowed; appeal dismissed.

No. 87-550: **Dieter v. Hand.** Stipulation allowed; appeal dismissed.

No. 87-554: **State v. Thompson.** Judgment affirmed; see Rule 7A(1).

No. 87-557: **State v. Bye.** Judgment affirmed; see Rule 7A.

No. 87-558: **State v. Roberts.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-565: **Whiteley v. Whiteley.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-566: **State v. Lee.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-568: **State v. Thompson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-570: **Old Orchard West Merchants Assn. v. Richman Gordman Stores.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-575: **Digilio v. Wilkinson Manufacturing Co.** Stipulation allowed; appeal dismissed.

No. 87-578: **Hansen v. Rodgers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-581: **Beeman v. Lacey.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-583: **Voyles v. Johnson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-585: **State v. Dement.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-586: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-588: **State v. Bills.** Judgment affirmed; see Rule 7A(1).

No. 87-593: **Burney v. Settles.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-594: **State ex rel. Rees v. Rees.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-600: **State v. Ham.** Judgment affirmed; see Rule 7A.

No. 87-603: **Bahr v. Bahr.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-604: **Sires v. Love.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-614: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-616: **In re Estate of Carlson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-617: **State v. Hodyc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-619: **Rudolf v. Yenney.** Motion of appellant to approve stipulation overruled; motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-621: **State v. Outhouse.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-622: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-623: **State v. Lyncook.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-625: **State v. Schweigart.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-638: **State v. Prothman.** Motion of appellee for summary affirmance overruled; judgment affirmed; see Rule 7A(1).

No. 87-639: **Bourg v. Bourg.** Stipulation allowed; appeal dismissed.

No. 87-640: **State v. Liss.** Stipulation allowed; appeal dismissed.

No. 87-643: **State v. Cox.** Judgment affirmed; see Rule 7A.

No. 87-644: **State v. Mason.** Stipulation allowed; appeal dismissed.

No. 87-646: **State v. Bruce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-650: **Failla v. Failla.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-652: **Hoskins-Western-Sonderegger v. Royal Ins. Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-653: **McMillion v. 24-Hour Nautilus.** Stipulation allowed; appeal dismissed.

No. 87-660: **Webster v. Egland.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-663: **Pinkston v. State.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-667: **Fox Valley Construction v. Vann.** Appeal dismissed per stipulation.

No. 87-672: **State v. Durand.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-673: **State v. Grayson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-683: **In re Estate of Wilde.** Stipulation allowed; appeal dismissed.

No. 87-686: **Crowley v. Vitek.** Stipulation allowed; appeal dismissed.

No. 87-687: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-688: **State v. Coleman.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-689: **State v. Felder.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-700: **Porcupine Feeders, Inc. v. Monfort of Colorado, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-702: **State v. Gagne.** Appeal dismissed. See Rule 7A(2).

No. 87-709: **State v. Kozal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-712: **State v. Barzar.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-718: **State v. DeJaynes.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-721: **State v. Ybarra.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-724: **Rassman v. Department of Correctional Services.** Appeal dismissed. See Rule 7A(2).

No. 87-725: **State v. Hill.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-726: **State v. Haynes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-728: **State v. Hembertt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-731: **Stiefel v. Homes Enterprises, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-732: **Pearson v. Red Lion Inn.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-738: **Wilkie v. Broomhall.** Joint motion to dismiss appeal sustained; stipulation of settlement approved.

No. 87-739: **Majors v. Majors.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-756: **State v. Sibert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-763: **Franco v. IBP, inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-764: **Phillips Investment Company v. Fitchett.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 87-768: **State v. Severeid.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-769: **State v. Durand.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-772: **Wright v. Madonna Professional Care Center.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-774: **State v. Pierce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-781: **Pinkleman v. Silvey.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-785: **Specht v. Block.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-786: **State v. Turen.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-787: **Ulrich v. Mid-Plains Technical Community College Area.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-804: **State v. Lamb.** Stipulation allowed; appeal dismissed.

No. 87-805: **Boyd v. Boyd.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-808: **Tilden Bank v. Schapmann.** Stipulation allowed; appeal dismissed.

No. 87-812: **Howard v. Howard.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-813: **Mata v. Rodriguez.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-818: **Rutledge v. Rutledge.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-820: **Felt v. New Tower Hotel Court, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-840: **Myers v. Accent Service Co., Inc.** Stipulation allowed; appeal dismissed.

No. 87-847: **Antoniak v. Vanderkolk.** Stipulation allowed; appeal dismissed.

No. 87-854: **Hake v. Hake.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-855: **Pickinpough v. Burlington Northern Railroad.** Stipulation allowed; appeal dismissed.

No. 87-862: **In re Valuation of Scotts Bluff County v. Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-870: **State v. Pena.** Stipulation allowed; appeal dismissed.

No. 87-871: **State v. Reed.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-893: **Vice v. German Mutual Insurance Assn.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-904: **In re Application of Bud Moore, Inc. v. Engel.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

THELMA BELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF LINNIE EARLY, DECEASED, APPELLANT, V. WILLIAMS CARE CENTER, INC., A NEBRASKA CORPORATION, APPELLEE.

409 N.W.2d 294

Filed July 17, 1987. No. 85-502.

1. **Expert Witnesses.** The admission of opinion testimony of an expert is generally discretionary with the trial court.
2. **Verdicts: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it.
3. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Charles I. Scudder, for appellant.

Joseph F. Bataillon of Sodoro, Daly & Sodoro, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiff-appellant, Thelma Bell, the daughter of Linnie Early, was appointed personal representative of the estate of Linnie Early. She brought this action in Douglas County District Court against the defendant-appellee, Williams Care Center, Inc., a Nebraska corporation, doing business as Williams Care Manor, a nursing home. Plaintiff's second amended petition set out three causes of action. The first alleged that the wrongful death of decedent was caused by

negligence of defendant in its failure to properly care for the decedent, a patient in defendant's nursing home. The second cause of action prayed for damages for decedent's medical and funeral expenses, and the third cause of action sought general damages for the pain and suffering of the decedent from the time defendant's alleged improper care began on December 9, 1981, to Linnie Early's death on March 20, 1982.

The defendant's answer to plaintiff's second amended petition generally denied the allegations of the petition and affirmatively alleged that in any and all treatment rendered to decedent, defendant exercised that degree of skill and care expected of a nursing home treating patients in Omaha, Douglas County, Nebraska, or similar communities.

At the conclusion of plaintiff's evidence, the trial court sustained defendant's motion to dismiss as to plaintiff's first cause of action seeking damages for wrongful death and as to the portion of plaintiff's second cause of action seeking damages for decedent's funeral expenses. Plaintiff has not assigned any error in this ruling. The issues raised in plaintiff's third cause of action for decedent's pain and suffering and in her second cause of action for related medical damages were apparently submitted to the jury. The jury instructions are not before us, but the record shows the plaintiff had no objections to the instructions as submitted.

After jury trial, a verdict was apparently returned and judgment entered for the defendant. The verdict is not in the record before us, but a journal entry shows the overruling of plaintiff's motion for new trial. Plaintiff timely appealed. In this court plaintiff assigns two errors, which together with subparts present the following errors: (1) The trial court erred in not sustaining plaintiff's motion for a new trial because "[t]he verdict of the jury was not sustained by sufficient evidence and was contrary to the overwhelming evidence of the Appellant" and the verdict must have resulted from passion, prejudice, or mistake, or from the misconduct of defendant's counsel in "intentionally injecting the issue of race into the jury's consideration"; and (2) the trial court erred "in allowing two of Appelle's [sic] expert witnesses to render opinions on an inadequate and insufficient foundation." We affirm.

The record shows the following. In October of 1980, the decedent, Linnie Early, age 62, became a resident of the Williams Care Manor, owned by defendant. Prior to entering the nursing home, the decedent had been hospitalized and was in need of 24-hour-a-day care. Dr. Kemp, a general practitioner, was decedent's physician from approximately 1962 to the time of her death. He submitted a physician's report on decedent's condition at the time of decedent's entering defendant's nursing home. That report listed the decedent's primary diagnosis at that time as "CVA [with] left side paralysis" and secondary diagnosis as "Hypertension [and] Diabetes." Dr. Kemp testified that CVA is a "cerebral vascular accident . . . . [I]t's like a stroke . . . ." The record shows decedent's CVA occurred approximately 10 or 11 years prior to her entering defendant's nursing home.

A nurse's aide, who worked for the defendant and cared for the decedent, and decedent's husband testified that the decedent had received a cut on her left great toe during a toenail reduction by a podiatrist brought to the home by defendant on December 9, 1981. Neither of the witnesses had seen the act of cutting. The husband testified that when he visited the decedent the next day, on December 10, 1981, the decedent told him "[t]hat doctor cut my toe . . . . I cried and cried." The husband testified further that he observed a bandage on decedent's left great toe, that he saw decedent almost every day after that, and that the decedent complained of pain in her foot.

The nurse's aide testified that she did not work on December 9, 1981, but that on December 10 the decedent complained to her that the "toe doctor" had cut her toe, and she removed a white gauze bandage from decedent's toe and observed a "deep puncture-type cut" with "drainage coming from it." The aide further testified that on December 29, 1981, decedent's bandage was removed and part of the skin of decedent's toe was removed with the bandage, and that a nurse in charge, a licensed practical nurse at defendant's nursing home, had to use scissors to cut the bandage and the skin off.

Thelma Bell testified that she observed a white gauze bandage on decedent's left toe sometime between December 9 and December 25, 1981.

The podiatrist who did the toenail reduction on decedent on December 9, 1981, stated that he did not recall that the decedent's skin was broken during the procedure and that he did not remember the patient's complaining of injury, nor did he remember applying any antiseptic or bandage to the patient.

The L.P.N. in charge testified that on December 29, 1981, she was called over to observe a wound on decedent's left great toe for the first time and that she called Dr. Kemp immediately. On December 31, 1981, Dr. Kemp saw decedent. He testified that decedent's left great toe had an area of healthy, granulated tissue and looked like skin had come off but could possibly be healed. He further testified that there did not appear to be a knife cut or laceration on the toe.

On January 18, 1982, the L.P.N. reported that "[r]esident has pain in Great [left] toe - broken area healed but area between toes appears damp and tip of toe appears dark." She testified that between December 31, 1981, and January 18, 1982, the red open area of the toe had filled in and "looked really great, and we were feeling pretty good that, being that she was a diabetic . . . it's going to be okay." The decedent was seen by Dr. Kemp on January 18, 1982, at which time he noted that decedent's toe looked like there might be some early infection or gangrene setting in. Dr. Kemp admitted the decedent to Lutheran Medical Center.

On January 22, 1982, the decedent underwent an arteriogram to measure the blood flow to the decedent's legs. That test showed a 90-percent obstruction in the left, common iliac artery, indicating that the blood supply to decedent's left leg was markedly diminished. On February 1, 1982, in an attempt to improve the blood supply to decedent's leg and "in order to save what remains of her left foot," Dr. Feldhaus, a vascular surgeon, performed a femoral artery graft and bypass. This operation was not successful in improving the blood flow to decedent's leg. On February 15, 1982, Dr. Donahue, a general surgeon, amputated the gangrenous first and second toes of the decedent's left foot. Dr. Donahue testified that, at that time, there was "practically no blood at all going into the distal end of the foot." On March 8, 1982, prior to surgery scheduled for March 9, decedent suffered a heart attack.

On March 18, 1982, after decedent's heart problems stabilized, Dr. Donahue performed an above-the-knee amputation on decedent's left leg, with no complications noted. Thereafter, the decedent developed "urinary kidney shutdown" and died of "cardiac arrest" on March 20, 1982.

At the trial, Dr. Donahue and Dr. Smith, a vascular surgeon, were called as witnesses by the defendant. Each doctor testified that the cause of decedent's gangrene was a lack of blood supply to decedent's foot due to blockages in the arteries to decedent's leg. Dr. Donahue testified that a "few small breaks" he saw on decedent's toe were breaks in the skin that were mildly infected and that "there was no relationship whatsoever" between that condition and the amputation. Dr. Smith testified that, in his opinion, it was unlikely that there could have been a cut on decedent's toe on December 9, 1981, because if there had been, a "roaring" infection would have been present on December 29, and there was no such infection present.

Dr. Recker was called as a witness by the plaintiff. He testified he was an endocrinologist, a doctor who studies diseases of the glandular system and treats them, along with diabetes. Dr. Recker testified that the alleged cut on decedent's toe on December 9, 1981, and the subsequent onset of gangrene were related. His testimony was premised on the circumstantial evidence that decedent's great toe had been cut on December 9, 1981. He had no personal knowledge if such a cut had occurred.

We first consider plaintiff's assignment of error that the trial court erred in allowing two of defendant's expert witnesses to render opinions on an inadequate and insufficient foundation. Plaintiff asserts that the court erred in permitting Drs. Donahue and Smith, who were called as witnesses by defendant, to testify, when there was inadequate foundation for their qualifications as experts.

Plaintiff objected to the testimony of Dr. Donahue, stating to the trial court:

> [T]here's a lack of foundation in regard to the basis of the question.
>
> In other words, the basis is just general medical knowledge; and I object to it on the grounds that we have an endocrinologist here give testimony, and the basis there

> was an examination of the complete records, and the deposition of [the nurse's aide].

Plaintiff's objection to Dr. Donahue's testimony was properly overruled, whether the objection be considered as being based on the witness' alleged lack of qualifications as an expert or upon a lack of foundation. The record shows that Dr. Donahue had been a surgeon for 32 years and during that time had performed approximately four to six amputations each year. The record further shows that Dr. Donahue was the treating surgeon and had observed Linnie Early since January of 1982.

Dr. Smith had been a general surgeon for 21 years, with a specialty in vascular surgery. Plaintiff did not object to either the qualifications of or the factual basis of the opinions stated by Dr. Smith.

The admission of opinion testimony of an expert is generally discretionary with the trial court. *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 378 N.W.2d 852 (1985). Without specific objection to the qualifications of a witness as an expert, admission of opinion testimony of an expert is not an abuse of the trial court's discretion. See *Bernadt v. Suburban Air, Inc., supra*. There was no error in permitting Drs. Donahue and Smith to testify.

Plaintiff also contends that the verdict should be vacated and a new trial granted because the verdict was influenced by misconduct of defendant's attorney in injecting the issue of race into the jury's consideration. The background on this issue was that the decedent was black, as were the owners of the defendant's nursing home. This contention is based on defendant's counsel's question to Burdine Williams, one of the stockholders in the defendant corporation, as follows: "Q. Are most of your patients black or white? A. We have all type." Plaintiff did not object to this question, did not ask for a mistrial, and first raised this issue of attorney misconduct in her amended motion for new trial. Not only has plaintiff failed to properly preserve the question, but the record does not show, in any way, that the question was prejudicial to the plaintiff. This assignment of error is without merit.

In determining the sufficiency of the evidence to sustain a

verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it. *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984). A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985). The evidence before the jury was clearly sufficient to support a verdict for defendant. This assignment of error is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

SESOSTRIS TEMPLE GOLDEN DUNES, AN UNINCORPORATED ASSOCIATION, APPELLANT, V. JAMES SCHUMAN, DOING BUSINESS AS BLUE ENGINEERING, APPELLEE.

409 N.W.2d 298

Filed July 17, 1987. No. 85-696.

1. **Damages: Proof.** The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
2. **Trial: Damages.** The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
3. **Uniform Commercial Code: Appeal and Error.** Where a case has been tried on the theory that the Uniform Commercial Code is applicable, upon appeal it will be decided upon the same theory.
4. **Jury Instructions.** Where it appears that the trial court's response to a question from the jury could not result in prejudice to any of the parties, the presence of the parties or their counsel is unnecessary.
5. **Actions: Contracts.** Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

T.J. Hallinan of Law Offices of Cobb & Hallinan, P.C., for appellant.

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This action arises out of a dispute concerning an oral agreement between the plaintiff, Sesostris Temple Golden Dunes, an unincorporated association, and the defendant, James Schuman, doing business as Blue Engineering, for the design and manufacture of certain parts for dune buggies.

The case was tried for 4 days on the plaintiff's third amended petition, the defendant's amended answer, and the plaintiff's reply.

The third amended petition alleged the defendant agreed to supply all material and manufacture the running gear for 10 dune buggies for $3,500. Since the dune buggies were to be used in parades and competitions, they were to be identical. Because the defendant failed to supply all materials as agreed, the plaintiff was required to supply parts costing $1,619.03. Because of poor workmanship the plaintiff was required to purchase additional parts costing $991.11. The plaintiff's damages amounted to $2,610.14.

A second cause of action alleged the defendant had overcharged the plaintiff $5,169.65.

The answer alleged the agreement was for the manufacture of a chassis with front hubs, steering gear, and gocart disk brakes; that the parts supplied were identical except that the use of black pipe as required by the plaintiff may have resulted in some deviation; that additional costs were incurred because of changes made by the plaintiff, which the defendant agreed to supply on the basis of cost plus labor; that some parts specified by the plaintiff were inferior in quality, resulting in additional costs; and that the plaintiff waived any claim for defects by accepting the product and not giving the defendant an opportunity to correct alleged defects.

A counterclaim alleged there was $1,680 due the defendant for extra time and labor as a result of modifications to the specifications and of discussions with the plaintiff concerning

changes and modifications to the specifications.

The reply amounted to a general denial of the allegations of the answer and counterclaim.

Before trial the plaintiff filed a motion in limine to exclude evidence of money received by its members from the sale of some of the dune buggies and to exclude the date the petition had been filed. Plaintiff's motion was sustained as to the sales, but not as to the date the petition was filed.

The jury found for the defendant on plaintiff's first cause of action, for the plaintiff on its second cause of action in the amount of $212.76, and for plaintiff on defendant's counterclaim. This appeal followed.

The plaintiff has assigned as error the trial court's denial of its motion in limine to exclude evidence as to the date the petition was filed; the trial court's failure to advise and consult with the attorneys concerning written questions from the jury; the trial court's failure to instruct the jury as to theories or issues supported by the evidence; the failure to submit special interrogatories or a special verdict form to the jury; the giving of certain instructions; and the prohibiting of argument that the frames were to be, but were not, identical.

The plaintiff did not brief the assignments of error concerning the motion in limine, the failure to instruct that there was a contract which did not require the defendant to supply parts, the failure to submit special interrogatories or a special verdict form, and the giving of instruction No. 13. Accordingly, those assignments of error will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987).

The testimony at trial was conflicting, and the facts concerning the terms of the oral agreement and alleged subsequent modifications are disputed. The evidence was sufficient to support the verdict. It is unnecessary to summarize the evidence in detail or to discuss the many conflicts in the testimony.

The plaintiff first argues that the trial court erred in failing to instruct the jury that the contract required the construction of identical vehicles. Plaintiff argues that theory was presented by the pleadings and supported by competent evidence, and its

omission was prejudicial error. The defendant responds the trial court properly omitted such an instruction because the plaintiff failed to allege any damages resulted from the defendant's alleged failure to construct identical buggies.

Instruction No. 2 did not set forth the plaintiff's allegation that the buggies were not identical, the allegation that the defendant had been made aware the buggies were to be identical, or that the defendant affirmatively alleged the buggies were in fact identical because the manufactured parts were built "on a jig," which ensured that all parts would be identical. The defendant had also alleged that any variations had been caused by the plaintiff. The president of the plaintiff, Harry Hartley, testified he informed the defendant, at their first meeting, that the buggies would be used in competition and had to be identical. On cross-examination, the defendant admitted that Hartley had so informed him. The trial court refused to give the requested instruction on the ground the issue was not relevant, because there was no evidence presented upon which the jury could base an award of monetary damages. Although there was evidence the defendant had been notified the buggies were not identical, there was no evidence of any damages suffered as a consequence.

The party seeking recovery has the burden of proving damages with as much certainty as the case permits. *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985). Such evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness. *Kahl v. Frederick*, 224 Neb. 212, 397 N.W.2d 46 (1986). Since there was no evidence of any loss of value caused by the defendant's alleged failure to produce identical frames, there was no issue to be submitted to the jury.

The plaintiff next contends that instructions Nos. 2 and 14 were erroneous, because the Uniform Commercial Code was not applicable.

The defendant responds the court properly instructed the jury, because article 2 of the Uniform Commercial Code was applicable to the transaction, as the dune buggy frames were "goods" as defined by the code.

The record shows the parties tried the case on the theory that

article 2 of the Nebraska Uniform Commercial Code was applicable. The defendant's amended answer affirmatively alleged the plaintiff had failed to give reasonable and timely notice of the defects and time to correct the defects. The third amended petition alleged the plaintiff had given notice of the defects within a reasonable time but the defendant had failed to correct them. There was conflicting evidence concerning notice of the defects given by the plaintiff, and the defendant's attempts to correct them. Further, the plaintiff did not object to instruction No. 14, which was drawn from Neb. U.C.C. § 2-609 (Reissue 1980) and stated that a buyer must notify the seller of a breach within a reasonable time after its discovery, and the burden is on the buyer to establish such a breach. Plaintiff also failed to object to that portion of instruction No. 2 which stated the plaintiff had to prove that it had given reasonable notice to the defendant of the alleged breaches.

The transaction in question was a mixed one; a sale of goods as defined by Neb. U.C.C. § 2-105 (Reissue 1980), and a sale of services. However, it is clear the parties tried the case on the theory that article 2 of the U.C.C. applied. Accordingly, we make no independent analysis of the issue and assume, without deciding, that article 2 applies to the transaction. See, *Hammond v. Streeter,* 225 Neb. 491, 406 N.W.2d 633 (1987); *O'Keefe Elevator v. Second Ave. Properties,* 216 Neb. 170, 343 N.W.2d 54 (1984); *Kearney Clinic Bldg. Corp. v. Weaver,* 211 Neb. 499, 319 N.W.2d 95 (1982).

The plaintiff next argues that the trial court erred in failing to notify counsel of the questions submitted by the jury during deliberation, which resulted in prejudice to the plaintiff. The trial court responded to the jury's requests by stating, "Reread the instructions. The answers to your questions can be found there."

The plaintiff argues that the verdict clearly indicates prejudice resulted from the court's failure to inform counsel of the jury's questions. In particular, the plaintiff argues the $212.76 which the jury awarded as a refund of overcharges must have been obtained by adding together the amounts charged by the defendant to install motor braces, bearings, and throttle cable, incurred after delivery. Plaintiff argues these

charges should have been awarded under its first cause of action, which alleged a failure to perform in a workmanlike manner. The plaintiff argues that counsel should have been given an opportunity to draft clearer instructions or submit a special verdict form.

The defendant responds that there was no prejudice to the plaintiff, because the verdict does not evidence confusion.

The questions submitted by the jury were as follows:

> First Cause of Action pg 4
>
> C. Effect of Findings first paragraph —
>
> Does this mean that if we do not find for the Plaintiff unanimously on all 5 propositions that we find in favor of the defendant?
>
> First Cause of Action pg 3
>
> B. Burden of Proof —
>
> (1.) Can we find that there was an agreement between Plaintiff & Defendant for Defendant to manufacture Dune Buggies, but not address the specifics of the contract i.e. that defendant was to supply all materials?
>
> Second Cause of Action pg 4
>
> Is consideration of Second Cause of Action contingent on finding in favor of Plaintiff in First Cause of Action?
>
> Can we find for the Defendant in First Cause and for the Plaintiff in Second Cause?

The trial court gave the following instructions. Instruction No. 2 stated the plaintiff's allegations that the parties had entered into an oral contract in which the defendant agreed to manufacture the running gear and supply all material for 10 dune buggies for $350 per unit. It further stated that the plaintiff alleged the defendant had failed to provide required materials, forcing the plaintiff to provide them at a cost of $1,619.03. It also stated that the plaintiff alleged the defendant had failed to perform in a workmanlike manner, in that the buggies failed to operate properly for their intended purpose and required the plaintiff to purchase additional parts at a cost of $991.11. It also stated that the plaintiff alleged that proper notice of the defects had been given to the defendant, and claimed damages in the amount of $2,610.14 for the breach.

Instruction No. 2 also set out the defendant's answer. This

included allegations the defendant had agreed to manufacture a chassis with front hubs, steering gear, and disk brakes; the provision for specific materials, but not all materials; and that the plaintiff had made substantial changes in its requests, which the defendant agreed to supply on the basis of cost of parts plus labor. It also stated the defendant denied a failure to perform in a workmanlike manner and that the plaintiff had failed to provide reasonable notice.

The instruction also contained the plaintiff's burden of proof. The jury was instructed that, on the first cause of action, the plaintiff had to prove, by a preponderance of the evidence, all of the following:

1. That the parties had entered into an oral contract in September 1978, in which the defendant had agreed to supply all material and manufacture the running gear for 10 dune buggies for $350 per unit;

2. that plaintiff had performed its duties under the contract;

3. that the defendant had failed to provide materials as agreed and failed to perform in a workmanlike manner;

4. that plaintiff gave notice to the defendant within a reasonable time after discovering the alleged breaches; and

5. that as a result of the breach the plaintiff sustained damages.

The jury was instructed that if the plaintiff failed to prove any one or more of the propositions set forth above, the verdict would be for the defendant.

As to the second cause of action, the jury was instructed that the plaintiff was seeking to recover overcharges in the amount of $5,169.65 and that to recover that amount the plaintiff had to prove:

1. That the defendant had received money from the plaintiff;

2. that the defendant retained possession of the money; and

3. that the defendant "in justice and fairness" ought to refund it.

The jury was further instructed that if the plaintiff failed to establish any of those elements by a preponderance of evidence, the verdict should be for the defendant.

The jury was instructed, in instruction No. 16, to award damages to the plaintiff on the second cause of action in an

amount which would "fairly and reasonably" compensate the plaintiff for any damages in excess of the contract price. As to damages on the first cause of action, instruction No. 15 instructed the jury to consider the cost of materials provided by the plaintiff and the cost of repairs due to the defendant's failure to perform in a workmanlike manner.

The jury's first question regarding the instructions was whether the jury had to find for the plaintiff on all five propositions in order to find in favor of the plaintiff on the first cause of action. This question was clearly answered by instruction No. 2, part I(C), which instructed the jury that the plaintiff had to establish all five propositions in order to prevail.

The second question was whether the jury could find for the plaintiff on a portion of instruction No. 2, part I(B)1, that there was a contract, but not make a finding as to its terms. That question was also answered by the instruction, which clearly stated the jury must find in favor of the plaintiff as to both the existence of the contract and its terms.

The third question was whether consideration of the second cause of action was contingent on a finding in favor of the plaintiff on the first cause of action. A fair reading of instruction No. 2 reveals the jury was instructed separately on each cause of action, and no contingency was expressed or implied.

The fourth question was whether the jury could find in favor of the defendant on the first cause of action and for the plaintiff on the second cause of action. The jury was instructed separately on each cause of action, and in the "effect of findings" portions of the instruction the trial court clearly stated that the jury could find in favor of either party.

In *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982), we held it was error to instruct a jury, after it had retired to deliberate, out of the presence of the parties and their counsel, but if it clearly appears prejudice did not and could not flow from such error, there was no ground for reversal. In this case the trial court did not further instruct the jury but responded that the questions could be answered by rereading the instructions, and the instructions did answer the questions.

The trial court's response to the jury's questions did not prejudice the plaintiff, because the jury's questions pertained to portions of the jury instructions which had not been objected to at trial, and did not relate to the calculation of damages. The assignment of error is overruled.

The plaintiff's final contention is that the trial court erred in instructing the jury on the second cause of action. Specifically, the plaintiff argues instruction No. 16 instructed the jury to fix an amount that would fairly and reasonably compensate the plaintiff for any overcharge, while the language in instruction No. 2 spoke in terms of "justice and fairness." The plaintiff claims this effectively changed the action from one for a sum certain to an equitable action.

At the conference on jury instructions the court stated:

> The Court is convinced that the second cause of action is an action at law. However, my research has indicated that the proper elements of an action for money retained such as is pled in the second cause of action is as set forth in paragraphs 1, 2, and 3 of the burden of proof on page 5 of Instruction 2 and that even though the language justice and fairness sounds like equity, that this is still a law action and that it should be submitted to the jury on that language.

The plaintiff argues that the use of such language permitted the jury to incorrectly interpose equitable considerations, and constituted an abuse of discretion.

The plaintiff's representative, Harry Hartley, testified that the amount of damages sought to be recovered on the second cause of action included "all costs up to receiving the cars in addition to the motion [sic] plates, gussets and bearings being installed." For the installation of the motor plates or braces and bearings the defendant required the plaintiff to pay $180 and required $32.76 for throttle cable, which was delivered after the plaintiff had taken delivery of the buggies and had made its final payment. The jury may have concluded that the defendant overcharged the plaintiff for these items, because there was evidence the defendant was informed at the time of delivery that a motor brace would be required to ensure that the buggies would perform and the throttle cable was required but it had

not yet been delivered to the defendant. The jury could have found that since these parts should have been provided by the defendant for the original contract price, the defendant should refund $212.76. These were issues of fact which were within the province of the jury. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 401 N.W.2d 489 (1987).

The plaintiff's argument that the language used by the trial court was improper is also unpersuasive. Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter. *Village of Morrill v. Roosevelt P.P. Dist.*, 215 Neb. 41, 337 N.W.2d 125 (1983); *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961).

The judgment of the trial court is affirmed.

AFFIRMED.

PROFESSIONAL RECRUITERS, INC., APPELLANT, V. JAMES H. OLIVER ET AL., APPELLEES.

409 N.W.2d 304

Filed July 17, 1987. No. 85-741.

1. **Uniform Commercial Code: Statute of Frauds.** The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
2. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded for a new trial.

Daniel W. Ryberg, for appellant.

Kenneth C. Fritzler of Ross, Schroeder & Fritzler, for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Hall County. Appellant, Professional Recruiters, Inc., brought suit in the district court against the appellees, James H. Oliver, The Ravenna Bank, Inc., and Bank of Doniphan, Inc., for fraudulent inducement, interference with the business relationship, and, in the alternative, for unjust enrichment. The demurrer of the Bank of Doniphan on the cause of action for unjust enrichment was sustained. All parties' motions for summary judgment were denied. At trial the jury returned a verdict for the appellees. The appellant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was also denied. This appeal follows.

In December of 1983 a representative of Professional Recruiters, Inc., contacted George Wanitschke of the Bank of Doniphan, inquiring as to whether his bank had an opening for a banking officer. Wanitschke stated that the bank was looking for someone, and the two agreed to combine efforts to fill the position. Professional Recruiters forwarded to Wanitschke a copy of the company's service agreement, including a fee structure, a company brochure, the candidate's resume, and a candidate referral sheet.

Later in the month Wanitschke interviewed the candidate and decided that the chairman of the board, appellee James Oliver, would have to interview the candidate before a decision to hire him could be reached. According to Wanitschke, Oliver had the ultimate hiring decision. According to Oliver, who sits on the boards of both the Bank of Doniphan and The Ravenna Bank, Oliver interviewed the candidate and offered him a choice to work for either the Bank of Doniphan or The Ravenna Bank. The candidate was ultimately hired by The Ravenna Bank.

Professional Recruiters contacted the appellees several times in an attempt to secure payment, but was unsuccessful. It subsequently brought suit in district court.

On appeal Professional Recruiters assigns as error that the

district court erred in giving an instruction on the Uniform Commercial Code statute of frauds, in not granting the appellant's motion for a directed verdict, in overruling the motion for new trial, and in refusing certain instructions.

Addressing the appellant's first assignment of error only, that is, that the district court incorrectly instructed the jury, over objection, concerning the Nebraska Uniform Commercial Code statute of frauds, the following instruction, in pertinent part, was given to the jury:

> ORAL AGREEMENT AND STATUTE OF FRAUDS
>
> You are instructed that the Statute of Frauds of this state provides:
>
> ". . . a contract for the sale of goods for the price of Five Hundred Dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ."
>
> ". . . a contract for the sale of personal property is not enforceable by way of action or defense beyond Five Thousand Dollars . . . unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought . . . ."

This instruction was taken verbatim from the Uniform Commercial Code statute of frauds for personal property and goods, Neb. U.C.C. §§ 1-206 and 2-201 (Reissue 1980).

The agreement between the appellant and the appellees did not involve personal property or goods. The plain language of these statutes and the definitional statute makes clear that these statutes do not apply to agreements for the performance of a service. Neb. U.C.C. § 2-105 (Reissue 1980).

Our cases have held that it is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). The district court did not instruct the jury on the law

of the case and, therefore, committed prejudicial error. In view of this disposition, the remaining assignments will not be discussed. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

RITA TUMA, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT AND RONALD E. SORENSEN, NEBRASKA COMMISSIONER OF LABOR, APPELLEES.

409 N.W.2d 306

Filed July 17, 1987. No. 86-102.

1. **Employment Security Law: Appeal and Error.** Appeals under the provisions of Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984) are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
2. **Employment Security Law.** Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
3. _____. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
4. _____. Failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

David R. Stickman of Stern, Swanson & Stickman, for appellant.

Thomas F. Hoarty, Jr., of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Laureen Van Norman, for appellee Sorensen.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

The claimant, Rita Tuma, appeals from an order of the district court for Douglas County affirming a decision of the Nebraska Department of Labor Appeal Tribunal. The tribunal had reversed an award by a department claims deputy awarding unemployment compensation benefits to claimant. The tribunal held that claimant's conduct constituted misconduct within the meaning of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), sufficient to bar claimant from receiving unemployment compensation benefits until after a waiting period. Claimant had been terminated from her employment as a stenographer with Omaha Public Power District for misconduct. Claimant has appealed to this court, alleging as error "[t]he holding of the district court that Ms. Tuma's failure to provide a statement from her physician that Ms. Tuma should not immediately return to a smoke-filled work environment detrimental to her health constitutes misconduct in connection with the claimant's work justifying a disqualification from employment benefits . . . ."

Appeals under the provisions of §§ 48-601 to 48-669 are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion. *Smith v. Sorensen,* 222 Neb. 599, 386 N.W.2d 5 (1986); *School Dist. No. 21 v. Ochoa,* 216 Neb. 191, 342 N.W.2d 665 (1984). Bearing this in mind, we must decide whether claimant's conduct constituted misconduct within the meaning of the Nebraska Employment Security Law. Pursuant to § 48-628(b) a claimant may be disqualified for benefits if he or she has been discharged for misconduct connected with his or her work. The term "misconduct" itself is not defined in the statute. This court has defined the term to include

> " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate

> violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' . . ."

Smith v. Sorensen, supra at 603, 386 N.W.2d at 8; *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983).

The record shows that on June 4, 1984, claimant began working as a stenographer for appellee Omaha Public Power District (O.P.P.D.). At the time of trial, an examining physician's report of an examination in 1984 was introduced, showing that claimant had related to him "a history of rather severe hypersensitivity to cigarette smoke."

The claimant worked in an open office area. Before November 1, 1984, she worked at a desk in the middle of the area. In the area then were nine persons who smoked. A diagram of the room showed four smokers in the open area itself, somewhat near claimant's desk. On October 29, 1984, claimant first indicated to her supervisor that she was having problems caused by smoking in the office area. The supervisor referred the problem to the O.P.P.D. employee relations department. The supervisor and members of that department had a meeting and decided to move claimant's desk and create a nonsmoking area. They also discussed the situation with the building manager, who arranged for a check of the airflow in the office and the installation of an extra return air duct to pull air away from the area of claimant's desk. The supervisor informed claimant the next day that the company was working on the problem. The layout of the office where claimant worked was changed immediately.

After November 1, 1984, a nonsmoking area, consisting of about one-half of the office, was created, and claimant's desk was moved and located in that area. O.P.P.D. changed the positioning of desks in the open office area to allow claimant to have a desk as far away as possible from the other workers who smoked. The nearest smoker's desk was more than 20 feet from claimant's. No-smoking signs and an ashtray were placed near

the area where claimant worked. Airflow was checked. A cold-air duct was installed on December 5, 1984. The last date that claimant was in the work area was December 6, 1984.

On December 5, 1984, Tuma was seen by her doctor, Dr. Wallace E. Duff. He prescribed some antibiotics for her condition. The following day Tuma had her husband obtain a statement from the physician's office that recommended she remain away from work for a period of 10 days, and after delivering it to her supervisor, Joyce Finnell, she left work.

Subsequently, Finnell telephoned Tuma and told her that O.P.P.D. wanted her to see a physician of its choice. On December 10, 1984, claimant was examined by Dr. Ronald W. Olnhausen. Dr. Olnhausen reported to O.P.P.D.:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error. Certainly there is a pre-existing history of allergy and hypersensitivity which may be a predisposing factor in her current difficulties. It is my feeling that she could return to work immediately if she were in a smoke-free environment.

On December 17, 1984, Tuma again saw Dr. Duff. Claimant did not submit any report from Dr. Duff concerning this visit. Claimant did write a letter, dated December 17, 1984, which her O.P.P.D. supervisor received on December 26. In the letter claimant said that she had seen Dr. Duff on that day and that he advised her "that since there were still unhealed bleeding points and ulcerations and because there have been no steps taken to remedy the smoke pollution in the office area, I should not return to work for at least 4 weeks . . . ." In his deposition testimony, Dr. Duff testified that he did not even know if claimant worked in an office. Dr. Duff further testified that after his December 17, 1984, examination, he determined "by physical examination she was better and subjectively she seemed to be better." At the hearings on this matter, claimant submitted a note on Dr. Duff's stationery dated December 26, 1984, and apparently signed by a nurse, stating that claimant

should not return to work for 4 weeks. In Dr. Duff's testimony, however, he did not testify concerning any such recommendation. Dr. Duff testified that he did not remember a specific discussion with claimant on December 17, 1984, concerning her returning to work.

Tuma called Finnell and informed her that she could not return to work for an additional 4 weeks. On December 21, 1984, O.P.P.D. sent Tuma a letter, which she received on December 22 and which read as follows:

> Dear Ms. Tuma:
>
> The District has taken all necessary steps to provide a work environment which is in compliance with the Nebraska Clean Indoor Air Act and which provides you a safe and satisfactory work area.
>
> Therefore, you are expected to be at work on Friday, December 28, at 8:00 a.m. In the event that you do not report for work as required herein, the District will conclude that you are no longer interested in retaining your position and that you have voluntarily terminated your employment.

The record shows the following medical letters received in evidence. On December 6, 1984, Dr. Duff wrote to claimant's personal doctor and to her attorney: "We do plan to follow her closely and will see if we can determine if, in fact, she can survive in the present atmosphere she is working in."

The physician who examined claimant on December 10, 1984, submitted a report stating in part:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error.

The evidence shows that O.P.P.D. was trying to furnish claimant a smoke-free area. As stated above, the office where claimant worked was changed so as to designate approximately one-half of the office as a nonsmoking area. An air duct was installed to withdraw the air near the smokers' desks, but claimant did not return to work at any time to determine its effect on the situation.

The record shows that claimant did not even attempt to work in the improved environment. The record also shows that claimant could work on the very day she was ordered to return to work at O.P.P.D. On that day, December 28, 1984, claimant filed a claim for unemployment benefits. Section 48-627(c) provides that a person receiving such benefits must be able to work and available for work. In her application for benefits, claimant answered the question, "Do you have any reasons which would prevent you from accepting immediate employment (i.e. . . . health . . .) if so, explain," by saying, "no — as long as it was in a smoke free area." (Emphasis in original.)

We find that O.P.P.D. was attempting to furnish claimant a "smoke free area." Claimant did not choose to cooperate with her employer's efforts to keep her employed. Such an attitude demonstrates a complete disregard of the employer's interests in getting work done in a difficult situation for all concerned. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.

Insofar as the district court found that claimant was guilty of misconduct in that she did not furnish medical information which she told O.P.P.D. substantiated the requirement that she remain off work for an additional 4 weeks after December 17, 1984, we also agree with the district court. Claimant informed her supervisor that she would furnish medical information from Dr. Duff. The facts, as set out above, show that claimant did not, at any time, have a report from Dr. Duff stating she should not return to work for 4 weeks after December 17, 1984. Claimant's letter of December 17, 1984, so stating, is not supported by any evidence from Dr. Duff.

We further determine, as did the district court, that failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constituted misconduct in connection with her work sufficient to justify a denial of unemployment compensation benefits. The decision of the

district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must vigorously dissent from the majority in this case. I do so because the majority opinion is wrong both as a matter of fact and as a matter of law. The majority has now concluded that an employee who refuses to let his or her employer experiment with the employee's health on a trial and error basis, albeit in good faith, is guilty of willful misconduct so as to deny the employee unemployment compensation benefits. It is, to me, significant that the majority is unable to cite any authority in support of that rule of law. I suspect that the majority's inability to do so is due to the fact that there is no precedent for such a rule. An employer may be entitled to ask an employee to "give all" in the sense of supporting the employer's work; it strikes me that it is too much to demand that the employee must likewise experiment with his or her health for the benefit of the employer.

This court has consistently held that the Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished, see *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985), and further that these beneficent purposes are not served by a strained construction of the statutes which will deny an unemployed worker the benefits of the act. See *Hanlon v. Bodin*, 209 Neb. 169, 306 N.W.2d 858 (1981). Notwithstanding that fact, the majority, while ignoring the recognized rules of law, now holds that an employee who is unwilling to permit his or her employer to experiment with the employee's health is guilty of willful misconduct.

The question of what constitutes misconduct has been defined by this court. We have defined the term to include behavior which evidences

> " '(1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or

> intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' . . ."

Smith v. Sorensen, 222 Neb. 599, 603, 386 N.W.2d 5, 8 (1986); *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983). While absenteeism can constitute "misconduct" under the statutes if the absences are without notice or unexcused or are continued despite warnings from the employer, *McCorison v. City of Lincoln, supra*, it is not considered misconduct to follow the advice of a treating physician and remain absent from work. See *Pacific Northwest Bell Tel. v. Employment Div.*, 37 Or. App. 843, 588 P.2d 654 (1978).

Unless it can be said that in some manner Ms. Tuma deliberately violated some rule, I am unable to find any evidence to support a finding that her termination was due to misconduct.

O.P.P.D. concedes that Ms. Tuma was being treated by a physician and had been ordered not to return to work for 4 weeks. Ms. Tuma's supervisor, Ms. Finnell, testified that she was fully aware of the nature of Ms. Tuma's illness and the reason why she did not return to work. Ms. Finnell testified as follows:

> Q. So, is it fair to say that, regardless of whether there was a doctor's statement or not, you as her supervisor at the Omaha Public Power District were fully aware of the nature of her illness and the reason why she did not return to work; is that correct?
>
> A. Yes.
>
> Q. And you had relayed that information on to your superiors at OPPD; is that correct?
>
> A. Yes.
>
> Q. So there could be no question that your business knew exactly why she was not there?
>
> A. Yes.

And while Ms. Tuma did not send a medical statement to O.P.P.D., she did in fact write to it. Ms. Finnell testified in that regard as follows:

> Q. All right. So, at least, as far as that conversation on

the 17th goes, there is no question that she did tell you she was going to send a letter; and she did, in fact, send the letter, didn't she?

A. Yes.

Q. You received the letter; is that correct?

A. I received that letter on the 22nd.

Q. The letter purports to be from Rita Tuma, does it not?

A. Yes.

Q. And the letter contains the information which she told you on the telephone, whether it be reading verbatim or told you, either way it contained that very information, didn't it?

A. Yes.

Q. You were aware when you received the letter, at least through her anyway, that she had seen the doctor and that she did have damage to her nasal tissue, and that he had advised her that there were unhealed, bleeding points because there had been no steps to remedy the pollution in the air, and that she should not return to work for four weeks?

You were at least — true or not, you were at least aware of that information from the letter; is that correct?

A. Yes.

Furthermore, while the majority makes a great deal out of the fact that Ms. Tuma failed to provide a letter from her physician, the evidence is clear that the company did not ask at any time for such a letter, nor did it have any rule requiring such a letter. Ms. Finnell testified as follows:

Q. Now, would I be correct in assuming that as a supervisor for her or any employee, part of your job would be to provide them instruction when they need a particular document or when they need something; is that correct?

A. Yes.

Q. Isn't it true, Miss Finnell, that you had never, at any time, told Ms. Tuma that "You need a statement from and signed by a physician in order to be excused from work"; isn't that true?

A. That's true.

Q. As a matter of fact, based upon your testimony at the prior hearing, one of your answers was: "Ms. Tuma called me to tell me that she had seen her doctor and that he had suggested that she take another four weeks off because of her condition. I questioned the four weeks, and she explained her medical problem to me over the phone, and then she volunteered to give me a letter."

A. Yes.

Q. That's your testimony; is that correct?

A. Yes.

Q. And you did receive a letter from her?

A. Yes.

Q. You as her supervisor never, at any time, told her or asked her to send a doctor's statement; isn't that correct?

A. That's correct. I assumed —

Q. You assumed?

A. Yes.

. . . .

Q. You assumed; is that correct?

A. She had provided me with one earlier. When she mentioned getting a letter to that effect, I assumed that it would be just like the one I had already received.

Q. But as her supervisor you never told her, "Look, Rita, in order for you to be gone for a time like four weeks, we're going to have to have some kind of medical substantiation"; you never told her that, did you?

A. No.

Q. And, to your knowledge, neither did anybody else from OPPD?

A. No.

This is supported by the testimony of Ms. Tuma, who testified on direct examination as follows:

Q. Now, with that what did you do with that information?

A. I contacted my attorney, and then I contacted Joyce Finnell. I read her a letter that I had composed and typed myself and told her that I would be sending her a copy of that letter in the mail.

I told her if she needed additional information she should contact my attorney *or the doctor*.

Q. Now, was this on the 17th of December?

A. Yes.

Q. Did you tell Miss Finnell — what did you tell her exactly?

A. The letter, which is in the Bill of Exceptions, I just read that to her.

Q. This Joyce Finnell is the same person you referred to earlier; is that correct?

A. Yes.

Q. And you had talked to her extensively concerning the problems you had been having; is that right?

A. Yes.

Q. Did you tell her on that day what Dr. Duff had advised you to do?

A. Yes.

Q. What, if anything, did Miss Finnell ask you to do at that time?

A. Nothing.

(Emphasis supplied.)

While there may be some dispute about the conversation between Ms. Tuma and her supervisor, there is no dispute that Ms. Tuma was not aware that a physician's statement was required or that if she did not provide such a statement she would be discharged. While the majority contends that Ms. Tuma's behavior was detrimental to her employer's interest and constituted misconduct, the evidence shows without dispute that Ms. Tuma was following her doctor's orders. The majority points out that Dr. Duff did not specifically recall the conversation, yet nowhere did Dr. Duff deny that he was treating Ms. Tuma or that he had instructed her that she must remain in a smoke-free environment. Had O.P.P.D. wanted something more than Ms. Tuma's letter, it should have made that request. To have expected Ms. Tuma to know that she was to send a letter from a physician and that upon failure to do so she would be considered to have terminated her employment was not reasonable under the facts.

The majority attempts to create the impression that Dr. Duff

did not recall treating Ms. Tuma; nevertheless, he testified by deposition with regard to these matters. His testimony is as follows: "When she came back and she still hadn't totally healed up I said, 'It seems to me if you continue to be exposed to whatever you are being exposed to, it might be detrimental and you might consider altering your environment.' " He further testified in his deposition that the trial and error suggested by O.P.P.D.'s physician could only be done after Ms. Tuma's nose was normal again. It had not yet reached that point.

This is not a case in which the employer was uncertain as to the extent and the nature of the injury. O.P.P.D.'s own physician sent a letter to O.P.P.D. supporting Dr. Duff's diagnosis of Ms. Tuma's condition. The letter, as noted by the majority, said:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error. Certainly there is a pre-existing history of allergy and hypersensitivity which may be a predisposing factor in her current difficulties. It is my feeling that she could return to work immediately if she were in a smoke-free environment.

Yet, as noted by the majority, it is conceded by everyone that she was not going to be in a smoke-free environment. Nevertheless, the majority suggests that because she was not willing to continue bleeding, she was guilty of willful misconduct.

Furthermore, the facts do not support the position taken by the majority. The testimony is uncontroverted that by moving the desks the situation was not improved, but rather became worse. That was the reason O.P.P.D. considered the additional duct. The evidence is further clear that the additional duct was no real solution. Finally, the evidence is clear that she was never told that the change had been made. Ms. Finnell was asked:

> Q- Did you ever advise Mrs. Tuma that there was a — a change in the- - -
>
> A- The air-flow?
>
> Q- - - -air — air-flow system?

A- Between the time when it was installed and the time she left. She was only in the office for three hours and I didn't have a chance to do that.

Ms. Tuma was never made aware that any changes were made, and no one bothered to explain to her what the changes were or how they might improve the situation. Furthermore, the record is devoid of any evidence to indicate that the changes would have made any difference. All that Ms. Tuma knew is that if she returned to work, she would continue to suffer from bleeding.

Lastly, action taken by O.P.P.D. did not comply with the requirements of the Nebraska Clean Indoor Air Act, as suggested in the letter from O.P.P.D. to Ms. Tuma or as suggested by the majority. Neb. Rev. Stat. § 71-5702 (Reissue 1986) specifically provides: "The purpose of sections 71-5701 to 71-5713 is to protect the public health, comfort, and environment by *prohibiting smoking* in public places and at public meetings except in designated smoking areas." (Emphasis supplied.) Under the provisions of Neb. Rev. Stat. § 71-5704 (Reissue 1986), this work area was clearly a public place within the meaning of the act. It was not appropriate for O.P.P.D. to designate the nonsmoking area; rather, it was necessary for O.P.P.D. to designate a limited smoking area. Even then, "Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas." Neb. Rev. Stat. § 71-5708 (Reissue 1986). Finally, Neb. Rev. Stat. § 71-5709 (Reissue 1986) provides:

> The proprietor or other person in charge of a public place shall make reasonable efforts to *prevent smoking* in the public place by:
>
> (1) Posting appropriate signs;
>
> (2) Arranging seating to provide a smoke-free area;
>
> (3) Asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or
>
> (4) Any other means which may be appropriate.

(Emphasis supplied.)

The evidence is clear that no arrangements were made to

provide a smoke-free area, nor were employees asked to refrain from smoking.

While O.P.P.D. may have been justified in discharging Ms. Tuma because of its inability to provide her with a safe place to work, its inability to do so did not justify its discharging her and claiming that the discharge was for misconduct on her part so as to deprive her of unemployment compensation benefits.

While Ms. Tuma obviously cannot obtain much comfort from our decision in this case, perhaps she can find solace in the haunting song from Jerome Kern:

They asked me how I knew
My true love was true?
I of course replied,
"Something here inside,
Cannot be denied."
. . . Smoke gets in your eyes.

STATE OF NEBRASKA, APPELLEE, V. THOMAS EDWARD NESBITT, APPELLANT.

409 N.W.2d 314

Filed July 17, 1987. No. 86-400.

1. **Evidence: Trial: Appeal and Error.** The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
2. **Evidence: Trial.** Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
3. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
4. **Convictions: Appeal and Error.** When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.

5. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, Thomas C. Riley, and Brian S. Munnelly, for appellant.

Robert M. Spire, Attorney General, and Lynne Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the district court for Douglas County. The appellant, Thomas Edward Nesbitt, was convicted by jury verdict of murder in the first degree and sentenced to a term of life imprisonment in the Nebraska Penal and Correctional Complex. On appeal the appellant alleges as error that the trial court improperly permitted the introduction of evidence concerning an alleged prior sexual assault, that the district court incorrectly overruled the appellant's motions to dismiss the case at the close of the State's case and at the close of all the evidence, and that the district court incorrectly overruled the defense's motion for mistrial due to prosecutorial misconduct.

The relevant facts are as follows. During the early morning hours of November 30, 1975, Gayla Jorgensen answered a phone call from Kathleen Ray, a former high school classmate, inviting Jorgensen and her cotenant, Mary Kay Harmer, to a party. The party was described as a "housewarming party" with a group of their schoolmates. Sometime later that morning Ray and another woman, later identified as Brigitte Kohlert, arrived at the women's apartment and persuaded Harmer to accompany them to the party. Jorgensen declined the invitation. Ray testified that the three women drove to 2619 North 15th Street, a house which she shared with the appellant.

Ray and Kohlert stated they left the "party" shortly after arriving, leaving Harmer and the appellant alone. Ray stated that as she was leaving the Nesbitt house she passed Wayne

Bieber on his way to appellant's house. Bieber was described at trial as a friend and next door neighbor of Nesbitt's. Bieber stated that he was not at the party and remained home that night. Ray went back and forth between Nesbitt's house and Bieber's house throughout the night. Ray went back to the house twice during the morning, but did not go inside.

The appellant was the only person who testified as to what happened at the party. Nesbitt testified that Bieber, Ray, and Kohlert remained at the party for some time, with Ray and Kohlert leaving to go next door. Bieber left for a while and later returned. At some point during the morning, according to Nesbitt, the deceased went to the bathroom and did not return. Nesbitt went to check and discovered Harmer lying on the floor in a pool of vomit. Nesbitt stated he knew she was dead. He testified that he did not call the authorities because he could not trust them.

There is testimony from both Ray and Bieber that the appellant appeared upset. Ray said that he asked her what Harmer would do if she were raped, and she told him Harmer would call the police. Nesbitt also asked her if she could "handle it" if the "Feds" were involved. Bieber stated that the appellant told him he might have "fucked up," and the two discussed whether Harmer should be let go or killed.

Ray testified that the appellant burned throw rugs, and Bieber testified that he burned clothing at Nesbitt's request. Ray stated that Nesbitt had cleaned the house later that day and asked her to clean also. Ray said that she cleaned up what she thought was blood in front of the refrigerator, which Nesbitt told her resulted from a bloody nose the deceased suffered. Ray also told a police officer that Nesbitt pointed to a stain on the shower curtain, telling her it was blood. Bieber said that he had smelled starter fluid in the house that morning and that Nesbitt requested him to find lye that afternoon, although Bieber stated they had no lye and Nesbitt stated he did not pour any such substance on the body.

Ray was told to say that Harmer had been at their house the night before, but was gone when they awoke in the morning. Ray said she was told by Nesbitt, "Let's just say she died of an overdose."

According to Nesbitt, Harmer's clothing was removed to obscure her identification, and the body was stored, wrapped in a carpet, in Bieber's garage until the remains were dumped in an Owens Landing manhole. Owens Landing is a partially developed housing subdivision near Carter Lake, Iowa. An engineering crew found the remains 9 years later.

At trial forensic experts testified that they were unable to determine the cause of death. Holes in the skull suggest bullet holes, but the specific characteristics associated with bullet holes are not present. Etchings on the teeth and skull suggest a caustic substance was poured on the head while tissue was still present. The sludge samples taken from the manhole revealed high calcium and pH levels, which are consistent with caustic alkaline substances such as lye.

Appellant's first assignment of error alleges that the trial court abused its discretion in permitting the State to introduce evidence as to a prior uncharged sexual assault allegedly committed by the appellant. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The evidence at issue is the testimony of Michele McKeever. McKeever testified that she was abducted by the appellant from the parking lot of her place of employment on November 11, 1974. She related that Nesbitt took her to one house, then to another house, identified as 2619 North 15th Street, where she was raped at least twice by the appellant. She was threatened with death should she report the incident, was forced to point out the locations of her family's homes, and was told they, too, would be killed. McKeever stated that she escaped the next morning.

Defense counsel objected on the ground that the probative value of the testimony was outweighed by its prejudicial effect. After a hearing out of the presence of the jury, a limiting instruction was given by the trial judge to the effect that the

testimony of McKeever may only be considered for the purposes set out in § 27-404(2). The appellant now argues that the State is suggesting that if McKeever was assaulted, so, too, was Harmer, pointing specifically to the statement made by the prosecution during closing argument that the deceased went through the same thing McKeever suffered.

The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). Section 27-404(2) is an inclusionary rule of evidence permitting the use of relevant other crimes, wrongs, or acts for the purposes enumerated therein.

In *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), we were faced with this issue in the context of a murder case not unlike the case at hand. There, the deceased's skeletal remains were discovered some years after her disappearance. Evidence of prior assaults by the defendant was admitted pursuant to § 27-404(2). The evidence was admitted to show similarities in the method of operation, identity, knowledge by the defendant of the area in which the remains were found, scheme, and plan. The evidence showed that the appellant used the same methods and took one of his victims quite near the spot where the deceased's remains were discovered. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986), is another murder case in which the appellant's prior assault was admitted under § 27-404(2). The similarities which made the prior assault probative include the appellant's strangulation of both victims and the context within which each assault took place. Each woman was, at the time of the assault, married to the appellant, and in each instance the woman was attempting to end the relationship. The evidence of the prior assault was admitted as being probative of the issues of intent and method.

Here, the district court found the testimony of McKeever was relevant under § 27-404(2) to show location, scheme, plan, and motives. Briefly, both women were taken to Nesbitt's home, and both were alone with the appellant. Nesbitt was obviously concerned about the authorities being told of McKeever's assault, as evidenced by his intimidation of the

victim. The testimony of Bieber and Ray makes apparent that he was concerned what Harmer would do if she were raped, and whether Ray could "handle it" if the authorities questioned her. In the McKeever case Nesbitt stopped at the home of another person and spoke with him for a few minutes before going to Nesbitt's house. Bieber and Nesbitt both testify to conversing with other people in order to be advised on what course of action to pursue.

The appellant argues that the probative value of McKeever's testimony is outweighed by its prejudicial effect on him. While the admission of evidence is largely left to the sound discretion of the trial judge, it is subject to the overriding concerns of Neb. Rev. Stat. § 27-403 (Reissue 1985), which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The testimony of McKeever is relevant. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). We cannot say that the appellant was unfairly prejudiced by the introduction of McKeever's testimony, and the admission of the evidence was not an abuse of discretion. *State v. Wilson, supra; State v. Kern, supra.*

Appellant's brief argues that the McKeever assault was uncharged conduct. We find this distinction to be irrelevant. The statute makes no such distinction, and uncharged conduct has previously been admitted under § 27-404(2). See, *State v. Kern, supra; State v. Ellis, supra; State v. Swiney*, 179 Neb. 230, 137 N.W.2d 808 (1965). This assignment of error is meritless.

Nesbitt next assigns as error that the trial court erred in failing to grant the defense's motions to dismiss at the close of the State's case and at the close of all the evidence, on the ground that the State failed to prove its case by showing that the decedent met her death feloniously at the hands of the defendant. We agree that there is no direct evidence as to how

Harmer died. However, circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Kane*, 224 Neb. 245, 397 N.W.2d 628 (1986).

The appellant relies heavily on the case of *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949). There, the defendant's second degree murder conviction was overturned on appeal on the ground that the State did not show that the deceased met her death as a result of the criminal actions of Reyes. The deceased met her death after jumping out of the defendant's car. This court held that there was no evidence to suggest that the injuries were feloniously inflicted and the conviction must be reversed. The *Reyes* case may be distinguished from this case on the basis that in *Reyes* evidence from the autopsy showed no evidence of a struggle; in short, no evidence that the deceased met her death feloniously. Here, the evidence suggests the deceased met her death feloniously, at the hands of the appellant, as opposed to *Reyes*, where the autopsy provided evidence to suggest the deceased did not meet her death at the hands of the defendant.

Although the evidence here is circumstantial, circumstantial evidence is entitled to be treated the same as direct evidence, and the State does not have the burden of disproving every hypothesis but that of guilt in order to sustain a conviction based upon circumstantial evidence. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

The appellant's brief also calls attention to the alleged contradictions in the testimony of McKeever. To that we only note that the conflicts in evidence and the credibility of witnesses are issues for the trier of fact. *Donnelson, supra.*

Taking a view of the evidence most favorable to the State, the evidence, if believed, would tend to prove that Nesbitt was a member of a semisecret society, the Hell's Angels, and that before and after the death of Harmer he used aliases, worked sparsely, and had on hand quantities of various controlled substances. Nesbitt lived off the income of Ray's two jobs and identified her as his "old lady." The evidence suggests that the women associated with Hell's Angels were referred to as "old

ladies" or "sweeties." An "old lady" was a woman who had a long-term relationship with a Hell's Angel and who took care of the home and supported the Hell's Angel so he would be free to attend to club business. The Hell's Angels distrusted all law enforcement personnel and did not discuss Angels' business even with their old ladies. The evidence suggests that "sweeties" were women with no long-term relationship with an Angel, and were often picked up for an evening solely for sexual purposes. The evidence suggests sweeties were often at Hell's Angels' parties and that the victim was a sweetie. "Party" is a term used to describe events at which drugs were freely available and used.

The jury could infer that Harmer was called to the party at appellant's request for purposes of sexual gratification and that the identity of the group and the location were withheld from her at Nesbitt's suggestion. Drugs were furnished to the victim and a sexual assault or at least an attempt was made. The victim was struck to "keep her in line," and sometime during the orgy she died. A strong inference arises from the testimony of Bieber and Ray that a motive for her killing was concealment of the assault. Nesbitt scrupulously cleaned the house, requiring Ray to help him, and burned or had burned the victim's clothes and throw rugs in the house. The nude, dead body was stored in a garage for about 36 hours until it could be hidden in an unused manhole in a remote area. Thereafter, a caustic substance was poured over her body to hasten decomposition and hinder identification. The State proved motive, opportunity, and a skeleton of a victim who obviously met death in a nonnormal manner.

In summary, there was sufficient evidence introduced at trial, if believed by the jury, to establish the elements of the crime of murder in the first degree, and the trial court's denials of the defense's motions to dismiss were without error. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the

conviction.

Appellant's third and final assignment of error alleges that the district court erred in failing to grant the defense's motion for mistrial on the grounds of prosecutorial misconduct. At trial the State attempted to elicit testimony concerning sexual assaults Nesbitt may have committed on Ray during their relationship. The prosecution asked Ray if she was ever sexually assaulted by the appellant. Defense counsel objected, and the question was answered in the judge's chambers, out of the hearing of the jury. The jury was properly admonished to disregard the question and not to try to speculate as to what the answer to the question may have been. Defense counsel's motion for mistrial was denied.

As the appellee's brief notes, the decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). Appellant argues that it was the State's intent to elicit inadmissible testimony. Regardless of the State's intent, we cannot say the appellant was prejudiced by the question. The answer was given out of the presence of the jury, and the jury was properly admonished. This assignment of error is without merit.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLANT, V. ALDEN JENSEN, APPELLEE.
409 N.W.2d 319

Filed July 17, 1987. No. 86-811.

1. **Criminal Law: Prosecuting Attorneys: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
2. **Criminal Law: Obscenity: Minors.** The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Exception sustained.

Michael G. Heavican, Lancaster County Attorney, and Jan W. Sharp, for appellant.

Peter K. Blakeslee, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The State of Nebraska appeals from the order of the district court for Lancaster County finding the appellee, Alden Jensen, not guilty of violating Neb. Rev. Stat. § 28-1463 (Reissue 1979). The appeal is authorized by Neb. Rev. Stat. §§ 29-2315.01 et seq. (Reissue 1985), which allow the county attorney to take exception to a ruling or decision of the trial court.

The facts upon which the charge against Jensen was based were contained in a stipulation of facts received into evidence by the court, including a videotape portraying the defendant. The stipulation entered into by the parties established that Alden Jensen's date of birth was November 5, 1952, and that sometime between December 1 and December 31, 1983, he appeared in a segment of a videotape that had been filmed by another adult male named Gerald High. The segment that the defendant appeared in also contained pictures of a male juvenile who was 14 years of age at the time of the taping.

The scene, in the early stages of the tape, portrays the defendant lying on a bed and smoking while completely nude. During that segment the male juvenile also appears completely naked, cavorting about the bed with some type of sword. Although there are not overt sexual acts taking place in the scene containing the defendant, there are a number of closeups of the defendant's genital area at times when his penis is tucked between his legs.

The stipulation entered into by the parties further establishes that the film contains numerous scenes of juveniles under the age of 16, as well as adults, engaging in various acts of sexual conduct including masturbation, masturbation of others, fellatio, and anal intercourse. There is no plot or story line in

the film, which displays nude and seminude individuals and contains scenes of sexual activity between juveniles under the age of 16 in film segments, some of which appear prior to the scene portraying the defendant.

The videotape was filmed in segments over a period of time by High at a residence in Lincoln, Lancaster County, Nebraska. The stipulation established that Jensen had viewed the earlier film segments that appear on the tape prior to his appearance and that he was aware of the nature of those film segments prior to the filming of the scenes that he appeared in.

During the period of time between December 1 and December 31, 1983, Jensen viewed the completed videotape in its entirety and told High that he wanted a copy of the film for his own use. At that time Jensen brought his own Beta videocassette recorder to High's residence and High's videocassette recorder was connected to Jensen's videocassette recorder so that a complete copy could be made of the above-described film. Jensen was present when the recording was made, and he watched part of the film during the taping. Jensen told Detective Sorensen of the Lincoln Police Department that at the time the above-described copy was made he was aware that the film portrayed children under the age of 16 engaging in sexual contact with other children.

The district court found the stipulations listed above to be the facts of the case and further found that the videotape, as a whole, was obscene and that § 28-1463 was not unconstitutionally vague as applied. The court framed the issue as follows:

> The fundamental issue is whether the conduct of the defendant comes within the prohibitions of [Neb. Rev. Stat. § 28-1463 (Reissue 1979)]. In other words, does appearing nude in a video tape with a youngster under the age of sixteen, who is also nude, constitute actions which can be said to "make, publish, present, direct, create, provide or in any manner generate" obscene material?

The court concluded that the statute did not make criminal the act of appearing in an obscene film and found the defendant not guilty as charged.

The State complains on appeal that the district court erred in

finding the defendant not guilty of generating obscenity. It urges us to find, first, that the statute prohibits appearing in films such as the one in evidence in this case; second, that copying the film violated the statute; and, third, that the defendant should have been found guilty of aiding and abetting filmmaker High.

Section 29-2315.01 allows the county attorney to "take exception to any ruling or decision of the court made during the prosecution of a cause . . . ." We note at the outset that the court made no rulings or decisions concerning whether Jensen's act of copying the film violated the statute, or whether Jensen aided and abetted High. Under the language of the statute these issues are not subject to review by this court.

We observe that § 28-1463 has been amended since the defendant was charged. See Neb. Rev. Stat. § 28-1463.03 (Reissue 1985). Both the new and the old sections utilize similar sets of verbs in describing the action prohibited. Compare § 28-1463.03 ("It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate . . .") and § 28-1463 ("It shall be unlawful for a person to make, publish, present, direct, create, provide, or in any manner generate . . ."). The 1979 statute prohibits generating "any obscene material which has as one of its participants or portrayed observers a child . . . ." § 28-1463. The 1985 amended statute drops the references to obscenity and makes illegal generating "any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." § 28-1463.03. Neb. Rev. Stat. § 28-1463.02 (Reissue 1985) defines the terms "visual depiction" and "sexually explicit conduct." It now appears that discussing the acts of the defendant in terms of whether what he did was obscene or not is precedentially moot and will not serve to clarify future prosecutions, since the Legislature has now abandoned that phraseology. However, we do feel the issue of whether appearing in a film constitutes making, publishing, directing, creating, providing, or in any manner generating a film is one that should be addressed.

The district court held that the language used in the statute applies to one who produces or distributes the obscene

material" and not to those appearing in the film. We disagree. Subsections (2) of both the 1979 and the 1985 statutes specifically address distribution. Subsection (1) of § 28-1463 uses the verbs "make, publish, . . . direct, create, provide, or in any manner generate," and in light of the separate subsection dealing with distribution, the opinion of the district court as to the limited application of the statute cannot stand. It is clear that the Legislature intended the statute to be thorough, exhaustive, and to describe all the activity involved in generating child pornography.

Webster's Third New International Dictionary, Unabridged (1981) provides the following definitions of the words in the statute:

make: to cause to exist, occur, or appear; to favor the growth or occurrence of; to carry out; perform.

publish: to place before the public; to produce for publication; to reproduce for public consumption.

direct: to show or point out the way; to guide and supervise; to train and lead performances.

create: to bring into existence; to make out of nothing and for the first time.

provide: to supply what is needed; equip.

generate: to cause to be; to propagate.

The trial court erred in limiting the effect of the statute to production and distribution. If the Legislature intended those areas to be the only ones prohibited by the statute, the language could have been so drafted. The definitions listed demonstrate that the statute covers more conduct than that of standing behind the camera. The contribution of Jensen to the film was to supply a not insignificant part to an admittedly obscene whole. In so doing he violated the statute.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD MASILKO, APPELLANT.

409 N.W.2d 322

Filed July 17, 1987. No. 86-875.

1. **Criminal Law: Right to Counsel: Words and Phrases.** Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."
2. **Criminal Law: Right to Counsel.** In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
3. **Constitutional Law: Criminal Law: Sentences: Jury Trials.** An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded with direction.

Jerry Matthews, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Richard Masilko, was initially charged in a two-count complaint. Count I charged him with third degree assault in violation of Neb. Rev. Stat. § 28-310 (Reissue 1985). This is a Class I misdemeanor, punishable by up to 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. § 28-106(1) (Reissue 1985). Count II charged Masilko with criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Reissue 1985). Because the value of the property involved was less than $100, this is a Class III misdemeanor, punishable by up to 3 months' imprisonment, a $500 fine, or both. See § 28-106(1). Masilko requested the appointment of counsel, and the county court for Sheridan County, Nebraska, granted his request and appointed the public defender to represent him.

Thereafter, a hearing was held to determine whether Masilko was in fact indigent and entitled to the services of the public defender.

Following that hearing, the county court determined that Masilko was not indigent and denied the motion for the appointment of counsel, setting the matter for trial on March 26, 1986. On March 26, Masilko appeared without counsel and informed the court that he was not ready to proceed, stating that he had been attempting to obtain an attorney but had not been able to procure one because of his financial status. The State then produced additional evidence on the issue of indigence, and Masilko was permitted to testify on his own behalf. The court overruled Masilko's reapplication for court-appointed counsel and ordered the trial to proceed forthwith.

It was not until this moment that Masilko was afforded an opportunity to enter pleas to the charges. At this time he entered pleas of not guilty to both of the earlier counts, and, since the complaint had been amended to include it, he also pleaded not guilty on a count of procuring alcoholic liquor for a minor, in violation of Neb. Rev. Stat. § 53-180 (Reissue 1984). This is a Class I misdemeanor, punishable by up to 1 year's imprisonment, a fine of $1,000 or both. See § 28-106(1).

Following trial to the bench, the court took the case under advisement and on April 2, 1986, found Masilko guilty on all three counts. On appeal to the district court for Sheridan County, Nebraska, the decision of the county court was affirmed. It is from this order which Masilko now appeals to this court, maintaining that (1) the county court erred in not appointing counsel for Masilko, and (2) the county court erred in denying Masilko's right to trial by jury. Masilko also maintains that the court should have granted his request for a continuance. Because we believe that the county court was in error in not appointing counsel for Masilko and in not affording him trial by jury, we need not address the issue of the continuance.

Turning first to the question of the appointment of counsel, Neb. Rev. Stat. § 29-1804.03 (Reissue 1985) provides in part: "(3) It shall also be the duty of the public defender to represent

all indigent persons charged with misdemeanor offenses punishable by imprisonment, when appointed by the court." Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."

We have held that

> [i]n determining whether a criminal defendant is indigent as the term is used in § 29-1804.04, the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.

State v. Lafler, 224 Neb. 613, 615, 399 N.W.2d 808, 811 (1987). Furthermore, we recently held in *State v. Richter,* 225 Neb. 837, 842, 408 N.W.2d 717, 720 (1987), that "[w]hile a situation where expenses exceed income, considered by itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel." We further said in *Richter* at 842, 408 N.W.2d at 720:

> In Richter's case, we are not oblivious to, and cannot disregard, Richter's bankruptcy proceedings, his service-related disability affecting earning capacity, and unavailability of retained counsel in view of the attorney fee and retainer demanded for representation of Richter. Richter's family situation needs no further elaboration as factors bearing upon the question of indigency in the present appeal. Based upon the foregoing circumstances, as well as the factors enunciated in *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), which were mandated in *State v. Lafler, supra*, the record demonstrates that Richter was indigent at the time of his trial in 1984. Whether Richter may have been imprudent in his fiscal management is irrelevant to the determination of indigency in this case.

We concluded in *Richter* by saying at 842-43, 408 N.W.2d at 720:

> If an adequate and properly presented defense to a charge may result in acquittal or exoneration from imprisonment after a defendant's conviction, representation by counsel is a rather substantial right of an accused. Without the benefit of counsel in such a serious situation as confronted Richter, including prospective incarceration, it is difficult, if not impossible, to conclude that a just result was obtained in Richter's 1984 trial and disposition of the charge against him. Consequently, we find there has been an abuse of discretion regarding determination of Richter's indigency and his request for court-appointed counsel.

In the instant case, the evidence discloses that while Masilko had some assets and was on occasion employed, it was clear from the evidence that his ability to obtain private counsel was at best marginal, and apparently impossible. Masilko's affidavit of indigency indicated that he is married and has a 3-year-old daughter. He listed his income as $50 and stated that he owned a 1964 Chevrolet automobile, having no value. He further listed in his affidavit that he had no money on his person or in the bank, and no receivables. He indicated that he had monthly expenses of about $500.

At the hearing held to determine whether in fact Masilko was indigent, evidence was produced indicating that he had a 15-percent permanent partial disability for which he had received a lump-sum settlement of some $3,000 in 1979. There was no indication as to what became of that money. It further developed that his wife was employed as a schoolteacher, earning between $11,500 and $12,000 per year. With regard to the matter of employment, the evidence indicated that Masilko worked as a day laborer for a James Taylor, who, according to Masilko, paid directly to Masilko a total of $200 from January 16 to February 26. While the evidence disclosed that Masilko did own clothing, carpentry tools, furniture, and equipment, no value on the property was established. It seems fairly clear, however, that even a sale of the property was not likely to produce much, if any, funds. His wife owned a 1982 Mazda

automobile in her name and her mother's name, and also owned a 12-speed bicycle. Masilko owned a 1982 Honda motorcycle, in which there appeared to be an equity of perhaps $100.

As we read the statutes involved in matters of this nature, we are of the opinion that the act creating the court's authority to appoint a public defender to represent an individual charged with either a felony or a misdemeanor punishable by imprisonment does not require an individual charged with an offense punishable by imprisonment to sell all of his or her assets before he or she may be considered indigent and entitled to the appointment of the public defender. Specifically, § 29-1804.04 provides that one is not required to prejudice one's financial ability to provide economic necessities for oneself or one's family in order to be determined indigent. Obviously, the purpose of the act is not to impose upon the public the obligation of providing counsel for one who has the means to provide for himself or herself; on the other hand, it seems fairly obvious that the act does not require one charged with a crime entitling the defendant to counsel to virtually dispose of all of his or her assets in order to obtain counsel. From the record in this case, it is apparent that Masilko would have been required to sell virtually all of his assets in order to hire counsel. Such a sale would have prejudiced his ability to provide economic necessities for himself. This we do not believe he is required to do. It appears to us that, considering all the factors listed in *State v. Lafler*, 224 Neb. 613, 399 N.W.2d 808 (1987), the county court was in error in not permitting the public defender to represent Masilko. It is therefore necessary that we reverse and remand this matter with directions to appoint the public defender to represent Masilko, and order a retrial of the charges.

In view of the fact that the matter is being remanded for trial, it is appropriate for us to comment on the question of granting Masilko a trial by jury. On two of the counts, the one involving third degree assault and the one involving procuring alcoholic liquor for a minor, Masilko could be sentenced to up to 1 year's imprisonment. These, therefore, constitute serious offenses entitling Masilko to a jury trial. As we observed in *State v. Lafler, supra*, an offense for which the maximum penalty is

Unless on remand Masilko intelligently and knowingly waives his constitutional right to a jury trial on the charges of assault in the third degree and procuring alcohol for a minor, the county court must afford Masilko a jury trial. Also, because Masilko requested a trial by jury, pursuant to Neb. Rev. Stat. § 24-536 (Reissue 1985) and within 10 days of entering his plea on the charge of criminal mischief, he is entitled to a jury trial on that charge as well.

In view of the fact that the matter is now being remanded for trial to a jury after appointment of counsel, we need not consider the issue of whether the trial court erred in not granting Masilko a continuance. The judgment of the district court is reversed and the cause remanded with instructions to remand the matter to the county court for Sheridan County, Nebraska, for trial in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

MILLARD RURAL FIRE PROTECTION DISTRICT NO. 1, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

409 N.W.2d 574

Filed July 24, 1987. No. 85-826.

1. **Annexation: Fire Protection Districts: Municipal Corporations.** If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
2. **Declaratory Judgments.** In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions.
3. **Declaratory Judgments: Equity: Appeal and Error.** In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Millard Rural Fire Protection District No. 1 (district) appeals from an order of the district court for Douglas County decreeing the rights, duties, and obligations of the parties regarding the City of Omaha's annexation of property formerly located within the district. We affirm.

The district was organized on March 27, 1952, as a rural fire protection district under the provisions of Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1952). The original boundaries of the district lie in both Douglas and Sarpy Counties along the western edge of Omaha. The district, which is served by the Millard Volunteer Fire Department, operates two fire stations with eight units of firefighting equipment and four rescue units. The facilities and equipment used by the volunteer fire department are provided by the district, which pays for all expenses incurred in the operation and maintenance of the fire and rescue service, as well as the training of volunteer firefighters.

The operation of the district is funded primarily by revenue raised from an annual tax levied on all real property located in the district. The district had incurred no bond debt to finance its operation until August of 1981, when it issued $890,000 of bonds in order to purchase new equipment and build a fire station. In June of 1983, the district had a second bond issue totaling $2 million, used in part to redeem the remaining bonds outstanding from the first issue and in part to purchase additional equipment and complete the new fire station.

During the period from 1968 to 1984, the city annexed several parcels of land located within the boundaries of the district. As the parcels of land were annexed by the city, they were taken into the jurisdictional limits of the city, removing them from the boundaries of the district and lessening the district's tax base from which to draw tax revenue. When an area is annexed by the city, the city assumes all responsibility for

providing fire protection and related services to that area.

Through 1981, neither the city nor the district made any attempt to negotiate an agreement regarding an adjustment of matters growing out of or connected with the numerous annexations. In April of 1982, attorneys for the district sent a letter to the city requesting that a meeting be held for the purpose of discussing a pro rata assumption by the City of Omaha of the bonded indebtedness of the district. The district and the city met in June and November of 1982 to discuss the annexations by the city and the city's assumption of a percentage of the district's bonded indebtedness. The city made a settlement offer to the district in August of 1983, which was apparently rejected by the district. The district filed a petition in the district court for Douglas County in February of 1984 and an amended petition in December of 1984, pursuant to Neb. Rev. Stat. § 31-766 (Reissue 1984), requesting a declaratory judgment determining the rights, duties, and responsibilities of the parties with respect to the annexed areas. See Neb. Rev. Stat. § 25-21,149 (Reissue 1985). The city answered the district's amended petition, alleging that the district's cause of action was barred by the statute of limitations.

At trial, Terry Jaros, secretary-treasurer for the district, testified that the annexations of areas from the district did not result in a reduction in the district's expenses because the majority of the expenses are fixed or ongoing expenses. Orlan Jurgenson, fire chief of the Millard Volunteer Fire Department, also testified that the annexations had no effect on the department's requirements for manpower, equipment, and fire stations, and there had been no material reduction in the expense of providing fire and rescue services after the annexations. Horton Dahlquist, chief of the City of Omaha Fire Division, was called as a witness for the city and testified that as the size of the fire protection district becomes smaller because of annexations, less equipment and personnel would be needed for fire protection. However, Dahlquist was not sure that the district's need for equipment and firefighters had actually decreased.

In attempting to establish the amount of recovery from the city, the district introduced into evidence schedules prepared by

a certified public accounting firm, outlining the expenses incurred by the district for the fiscal years 1969 through 1984. A percentage was then obtained for each fiscal year by dividing the cumulative annexations by the total tax base plus cumulative annexations. The percentage was then multiplied by the total expenditures of the district for the following fiscal year to obtain the amount of damages for each year. The total combined damages for all years amounted to $360,945.65.

Terence Leaders, who was employed in the city finance department for 16 years and was directly responsible for annexations for 14 years, testified for the city. Leaders contested the method used by the district for calculating any amount due after annexation and outlined the method used by the city to calculate the percentage of bonded indebtedness which the city proposed to assume because of the annexations. Leaders disagreed with the district's method, which failed to include the value of property located in Sarpy County in computing the district's tax base, failed to consider the capital and liquid assets available to the district, and incorrectly considered a compounded effect of the annexations in arriving at its cumulative annexation percentage.

In determining the amount of debt to be assumed by the city as a result of the annexations, the city first calculated the net debt of the district outstanding by subtracting the district's liquid assets (cash and investments) from the amount of the outstanding liabilities (notes payable and bonds payable) of the district. Next, the city calculated the total value of the district's tax base, considering the value of land located in both Douglas and Sarpy Counties. A percentage of valuation was then calculated, dividing the value of the property annexed for each year by the total taxable valuation of the district for each corresponding year. That percentage was applied to the net debt outstanding for each year to arrive at the amount of net debt related to each annexation which was to be assumed by the city. Leaders testified that, although this was the first time the city had negotiated with a fire protection district regarding annexation of a district's property, the method used by the city in calculating the net debt to be assumed was the same procedure used by the city in adjusting the indebtedness

assumed upon partial annexation of a sanitary and improvement district. According to Leaders, the method used was the industry standard and "is simply taking a pro rata share of the outstanding debt of the District as each annexation occurs."

The district court found that each separate annexation gave rise to a separate claim pursuant to § 31-766 and that all claims arising prior to February 10, 1980, were barred by the applicable statutes of limitations. The district court also made the following findings:

> 4. The fire protection and emergency service provided by the Defendant to such annexed areas is a "liability" assumed by the Defendant pursuant to Section 31-766, Nebraska Revised Statutes.
>
> 5. In connection with each such annexation, the incremental reduction of the Plaintiff's tax base, as it relates to producing revenue for operation and maintenance, is balanced or off-set by the corresponding incremental assumption of liability by the Defendant through its assumption of fire protection and emergency service responsibility.
>
> 6. In connection with each such annexation, the incremental reduction of the Plaintiff's tax base, as it relates to producing revenue for repayment of indebtedness, is balanced by the corresponding assumption by the Defendant of a pro-rata share of such indebtedness. An equitable means of determining such pro-rata share is to take the amount of the Plaintiff's net debt times the percentage of valuation of the Plaintiff's territory annexed. This formula must be applied separately for each annexation.
>
> 7. The method of defining and computing the division of assets and liability outlined in paragraphs 5 and 6, hereinabove, is the method accepted through common usage and practice in Douglas County by affected parties in connection with partial annexations pursuant to Section 31-766, Nebraska Revised Statutes.

The district court ordered that "the Defendant pay the Plaintiff the sum of $11,346.47 in connection with such

annexations occurring from 1980 through 1983. Any claims by Plaintiff for monies from Defendant for such annexations occurring before 1980 are now and forever barred."

The district appeals and assigns error to each of the district court's specific findings.

Section 31-766 provides in relevant part:

> If only a part of the territory within any sanitary and improvement district, any road improvement district, or any fire protection district is annexed by a city or village, the . . . fire protection district . . . and the city or village acting through its governing body *may* agree between themselves as to the equitable division of the assets, liabilities, maintenance, or other obligations of the district for a change in the boundaries of the district so as to exclude the portion annexed by the city or village or *may* agree upon a merger of the district with the city or village. . . . If the district and city or village do not agree upon the proper adjustment of all matters growing out of the annexation of a part of the territory located within the district, either the district or the annexing city or village *may* apply to the district court of the county where the major portion of the district is located for an adjustment of all matters growing out of or in any way connected with the annexation of such territory, and after a hearing thereon the court may enter an order or decree fixing the rights, duties, and obligations of the parties . . . .

(Emphasis supplied.)

Concerning an action commenced under § 31-766, we stated in *City of Bellevue v. Eastern Sarpy County S. F. P. Dist.*, 180 Neb. 340, 343, 143 N.W.2d 62, 64 (1966): "The authority conferred upon the district court by section 31-766 . . . is to adjust matters growing out of the annexation. The statute contemplates that the annexation shall be complete at the time the application is filed." See, also, *Webber v. City of Scottsbluff*, 187 Neb. 282, 188 N.W.2d 814 (1971). The validity of an annexation by a city or village of property located within a fire protection district or sanitary and improvement district does not depend upon compliance with § 31-766. See *Webber v. City of Scottsbluff, supra*. However, § 31-766 "obviously

contemplates a prompt division of the assets and liabilities of the district and the exclusion of the portion annexed from further control by the district," *Sanitary & Improvement Dist. v. City of Ralston*, 182 Neb. 63, 70, 152 N.W.2d 111, 115 (1967), and, if an adjustment of matters arising out of the annexation is sought, either the district or the city must institute proceedings under § 31-766 as soon as it becomes evident that an agreed adjustment cannot be reached. See *Abernathy v. City of Omaha*, 183 Neb. 660, 163 N.W.2d 579 (1968), where we stated that § 31-766 must be construed in the light of Neb. Rev. Stat. §§ 31-764 and 31-765 (Reissue 1984). Section 31-765 provides that a merger of a district and a city or village shall be effective 30 days after the effective date of an ordinance annexing all of the territory within a district. Section 31-764 provides that the trustees of a district shall submit to the city a written accounting of all assets and liabilities of the district within 30 days of the effective date of the merger of the annexed district and the city. We have recognized, therefore, that an action brought under § 31-766 must be commenced within a reasonable time after the annexation of part of a district by a city.

This action was brought in the form of a declaratory judgment to determine the rights, duties, and responsibilities of the parties with respect to the annexed areas. In *OB-GYN v. Blue Cross*, 219 Neb. 199, 202, 361 N.W.2d 550, 553 (1985), we noted that "a declaratory judgment action is sui generis and may involve questions of both law and equity. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983)." See, also, *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions. Neb. Rev. Stat. § 25-21,157 (Reissue 1985); *OB-GYN v. Blue Cross, supra; Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973). All declaratory judgment orders and decrees may be reviewed as other orders, judgments, and decrees. Neb. Rev. Stat. § 25-21,155 (Reissue 1985); *OB-GYN v. Blue Cross, supra.* In an appeal of a declaratory judgment action concerning an equity case, the Supreme Court reviews

the trial court's findings of fact de novo on the record. Neb. Rev. Stat. § 25-1925 (Reissue 1985); *OB-GYN v. Blue Cross, supra*. With regard to questions of law involved in an appeal, the Supreme Court has the obligation to reach independent conclusions with respect to those questions. *OB-GYN v. Blue Cross, supra; Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983).

For an assignment of error, the district claims that the district court erred in finding that the statute of limitations barred the district's claims arising prior to 1980. The statute of limitations, if applicable, may be raised and relied on in an equity action. See, *Cape Co. v. Wiebe*, 196 Neb. 204, 241 N.W.2d 830 (1976); *Campbell v. Kirby*, 195 Neb. 610, 239 N.W.2d 792 (1976); *Uptegrove v. Elsasser*, 161 Neb. 527, 74 N.W.2d 61 (1955); *Abels v. Bennett*, 158 Neb. 699, 64 N.W.2d 481 (1954); *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935). A defendant may raise any appropriate defense available, whether it be legal or equitable, in any case. *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984); *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959); *Kelly v. Kannarr*, 118 Neb. 472, 225 N.W. 230 (1929). This rule follows from the fact that Nebraska has abolished all distinctions between actions at law and suits in equity and in their place established one form of action denominated a "civil action." See, Neb. Rev. Stat. § 25-101 (Reissue 1985); *Wischmann v. Raikes, supra*.

Neb. Rev. Stat. § 25-204 (Reissue 1985) states: "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." The district court found that Neb. Rev. Stat. §§ 25-206, 25-207, and 25-212 (Reissue 1985) were applicable and each barred any claim of the district prior to 1980. Section 25-206 provides: "An action upon a contract, not in writing, expressed or implied, *or an action upon a liability created by statute*, other than a forfeiture or penalty, can only be brought within four years." (Emphasis supplied.) Section 25-207 provides in part: "The following actions can only be brought within four years: . . . (3) an action for the injury to the

rights of the plaintiff, not arising on contract, and not hereinafter enumerated . . . ." Section 25-212 provides: "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." No matter which of the above sections is applied to an action commenced under § 31-766, the action must be commenced within 4 years after the effective date of the annexation ordinance. The present action was commenced by the district on February 10, 1984. Therefore, all the district's annexation claims arising prior to February 10, 1980, were barred. The district court did not err in so determining.

The district also assigns as error the district court's findings regarding the division of the assets, liabilities, maintenance, and other obligations of the district. In essence, the district argues that the city should not only have to assume a percentage of the district's bond debt relating to the annexed areas, but should also be required to assume a percentage of the district's ongoing operation and maintenance expenses relating to the entire district. The district ignores the fact that the city has assumed full responsibility for the maintenance and operation of fire and rescue services for the areas annexed by the city. Although the annexation of areas from the district does remove property from the district's tax base, the record shows that the actual value of property in Douglas County remaining within the district rose from approximately $132 million in 1968 to approximately $751 million in 1984. Based on our de novo review of the record, under the circumstances we find that the method of adjustment proposed by the city, that is, a pro rata assumption of the net bonded indebtedness of the district relating to the percentage of valuation of the annexed property, along with assumption of responsibility for providing fire and rescue services to the annexed areas, results in an equitable division of the assets, liabilities, maintenance, and other obligations of the district. In this regard, we reach the same conclusion as that of the district court, and, finding no errors in the record, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS RYAN, APPELLANT.

409 N.W.2d 579

Filed July 24, 1987. No. 86-477.

1. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
2. _____: _____: _____. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
3. **Sentences.** The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention.
4. **Photographs: Juries.** Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime.
5. **Evidence: Witnesses: Trial.** The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
6. **Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion.
7. **Evidence: Words and Phrases.** Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
8. **Jury Instructions: Appeal and Error.** The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.
9. _____: _____. All of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
10. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Rodney J. Rehm of Rehm & Bartling, and, on brief, Victor Faesser, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant, Dennis Ryan, was charged with first degree murder in the torture death of James Thimm. Thimm died on or about April 30, 1985, as the result of being physically abused for several days before his death.

The defendant's father, Michael Ryan, who will be referred to as Ryan, was the leader of a group or cult that was living on a farm near Rulo in Richardson County, Nebraska. The defendant and Thimm were members of the group, but Thimm had fallen out of favor and had been demoted to the status of a "slave." Ryan decided that Thimm should be tortured and then killed, and directed the men living at the farm, including the defendant, in the abuse of Thimm.

The information against the defendant was filed on September 18, 1985. At his arraignment on October 8, 1985, he pleaded not guilty. A motion to waive jurisdiction to the juvenile court was filed on November 27, 1985, together with a notice of intent to rely upon the defenses of insanity or diminished capacity.

The motion to waive jurisdiction to the juvenile court was overruled on December 18, 1985. On the same day the defendant's case was consolidated with the cases of the defendant's father and Timothy Haverkamp and a change of venue granted to Douglas County, Nebraska.

Jury selection commenced February 24, 1986; trial began March 10 and was concluded on April 10. The jury returned a verdict of guilty of second degree murder, and the defendant was sentenced to life imprisonment.

On appeal the defendant has set forth seven assignments of error on six issues. The defendant contends the trial court erred in failing to grant his motion to waive jurisdiction to the juvenile court, in receiving into evidence various photographs, in excluding certain testimony, in sustaining his codefendant's objections to the introduction of two depositions, in refusing to give certain requested jury instructions, and by imposing an excessive sentence.

The defendant first contends the trial court erred in refusing to grant his motion to waive jurisdiction to the juvenile court. It is his position the evidence presented at the transfer hearing does not support the court's findings and order denying the transfer. The State contends the district court properly denied the defendant's motion because the statutorily required balancing test by which public protection is weighed against the practical and probable rehabilitation of the defendant mandated retention by the district court.

The defendant was born August 31, 1969. On the date of the offense he was 15 years and 8 months old. His parents removed him from school after he had completed the eighth grade at Holton, Kansas.

At the hearing on the motion to waive jurisdiction to the juvenile court, the State introduced evidence concerning the torture of James Thimm and the defendant's participation in it.

The men who lived at the farm near Rulo, in addition to Ryan, James Thimm, and the defendant, included John David Andreas, James Haverkamp, Timothy Haverkamp, and Richard Stice. There were also a number of women and children. The women included Ruth Ryan, the wife of Michael Ryan and the mother of the defendant, Cheryl Gibson, Lisa Haverkamp, and Maxine Haverkamp. The children included Luke Stice, the 5-year-old son of Rick Stice, who also was tortured and killed at the direction of Ryan.

Andreas testified he had resided in Beatrice, Nebraska, for 19 years, and had moved to the Rulo farm in August 1984 because Ryan had told him that God wanted Andreas to move there. Andreas had known James Thimm for 7 or 8 years prior to his move to the Rulo farm. Thimm, who was approximately 25 or 26 at that time, was already living on the farm when Andreas moved there. Andreas testified he met Ryan in the latter part of 1982, a few days after a meeting near Hiawatha, Kansas, where a group of people were discussing different ways to defend themselves in the event of a breakdown of law and order and a Soviet attack. A few weeks later they met again at Ryan's home in Whiting, Kansas, and discussed the problems of the country and the activities occurring which were contrary to the words of the Bible.

Andreas continued to work at his job through 1983 and part of 1984, and the three men continued to get together. At some point, either in December of 1982 or January of 1983, Ryan said he could speak to God, and God would answer yes or no. Ryan and his brother-in-law had said they could talk to God and "they'd use one of their arm — right arm and they'd ask a question, and if the arm was strong, it was a yes, and if it was — the arm was weak, then it was a no." Andreas testified that "If the person that is holding the arm up would resist and the other person would press on the arm and try to force it down, and if it would stay up, or you could tell the difference in the strength, then it would be a yes." Andreas believed Ryan could talk to God during the period of early 1983 through August 1984, and had possibly seen Ryan use the defendant's arm to talk to God during that time. During the summer of 1983 Ryan told Andreas he could ask God whether or not people were "in deep trouble with God, and he even went as far as to say that you were in a condition where you would burn in hell if you didn't change . . . ." Ryan referred to God as "Yahweh." During that period Andreas participated in various thefts because Ryan said God wanted them to do so. Andreas stated he had equated their situation with being at war and taking from your enemies. The defendant did not participate in these thefts, but helped unload stolen property and was present when the thefts were discussed.

When Ryan told Andreas he should move to the farm and live with the group, Andreas stopped working in Beatrice. When Andreas moved to the farm, Cheryl Gibson and her children, Ryan and his family, James Thimm, Rick Stice and his three children, and James Haverkamp and his sister Lisa were already there. Andreas testified that once on the farm he and the other men, including the defendant, each had rifles.

A sort of military rank was imposed wherein the defendant began as a corporal and eventually was promoted to the rank of general. Andreas testified that at some point Ryan began to talk to God through his mind and that God told Ryan what everyone's rank should be.

Andreas testified he stayed on the farm from August 1984 until June 25, 1985, when he was arrested. He stated the defendant was promoted because, according to Ryan, the

defendant "had more faith in God than any of the rest of us did and that he did everything he was told without question or didn't have any bad thoughts in his mind." The defendant seemed proud of his promotions and was very enthusiastic. Andreas initially was given the rank of private but eventually was promoted to general. Ryan called himself the king. The defendant was called a prince and Tim Haverkamp a high priest. Andreas testified that a watch was kept on the road to see if anyone was coming from approximately 6 a.m. to about 10 p.m. every day. The watch was to look for law enforcement people, and, although the guard was armed, they were instructed to radio Ryan rather than use the weapons. Andreas testified the defendant did some guard duty and was treated like the other men. Although all of the men, other than Ryan, were eventually promoted to general, the defendant had authority over the other men, including James Haverkamp, Andreas, James Thimm, Tim Haverkamp, and Rick Stice. The defendant had authority to tell the others to do certain activities and relayed messages to them from Ryan.

Andreas testified in detail about Thimm's death. Thimm had been given the status of slave after the first of the year in 1984 and was living in a separate trailer because Ryan said he was in big trouble with God and was going to burn in hell. Ryan had told them Thimm had been demoted to slave because he had denied God and had bad thoughts. Additionally, there had been a message from God that Thimm had poisoned a wild turkey which had been shot and was to be used for the feast to celebrate the birth of Lisa Haverkamp's child. That incident was the final occurrence which resulted in Thimm's demotion. About 1 month prior to his death he was chained up at night and forced to sleep on the porch of the south trailer house. Thimm was chained at night by the defendant, or one of the others, or himself. Thimm did not resist this treatment in any manner. The chain was padlocked to his ankle, or around his waist or stomach, and attached to a post. Andreas testified Thimm was chained at night because "Mike said that God had told him that he might run off, or just that God had said that that's what was supposed to be done to James Thimm because he was having bad thoughts." During the day Thimm did activities around the

farm.

Andreas testified that in about the middle of March Thimm was shot through his left cheek by the defendant. Thimm was then fed cayenne pepper to control the bleeding and was bandaged by Ryan.

Andreas testified that Rick Stice was also demoted to slave after the first of the year in 1984. Andreas stated that the defendant and Tim Haverkamp lived in the south trailer, to which the porch in which Thimm lived was attached.

Two days before his death Thimm was moved to the hog confinement building and was instructed by Ryan to take a goat with him and have sex with it. Thimm was given a jar for water, a hotplate, and a sleeping bag. The next day someone took a turtle to him for food. The day before Thimm died Ryan inserted a greased shovel handle into Thimm's rectum several times, then the defendant, Tim Haverkamp, James Haverkamp, and Andreas also did so. Thimm offered no resistance. Later that same day the same men whipped Thimm. At this time Thimm was spread-eagled against an auger. Each man was directed to inflict 15 lashes. Two whips were used, a bullwhip and a livestock whip. As a result of the whipping, Thimm's skin was reddened. The men then left Thimm in the confinement building, restrained.

The next day Thimm was whipped again, because the redness from the first day was gone. The same men were involved and again inflicted 15 lashes apiece. Ryan then directed each man to take one shot at one finger on one of Thimm's hands. Andreas and Haverkamp then prepared to disk the field, and Ryan told Andreas to come into the building and say goodbye to "your good friend." At that time Thimm was alive and coherent, but unclothed. The defendant, Ryan, and Tim Haverkamp were in the confinement building. A short time later Andreas looked into the building and saw that Thimm's thighs were broken, and, he testified, it was the last time that he saw Thimm alive. Ryan later told Andreas that Thimm was dead and they would bury him that evening.

Later that evening Andreas saw Thimm's body on the sleeping bag, saw that his legs were broken, and saw that he had been skinned on one leg. The body was also more bruised than it

had been the last time Andreas had seen it. Andreas testified the defendant "thought it was kind of — it was kind of neat that he had helped kill somebody." Tim Haverkamp, the defendant, and Andreas dug the grave in the field that had been disked. Thimm was placed in the grave, and Ryan directed Haverkamp to shoot Thimm's head. Prior to that time Andreas had seen no signs of life in Thimm.

Andreas testified the defendant had later bragged about the killing and did not show remorse or sorrow.

On cross-examination Andreas testified that during the time he resided at the Rulo farm he believed that Ryan could talk to Yahweh. Andreas also testified Ryan did not threaten him with bodily harm when he directed Andreas and the others to torture Thimm, but told them God would be pleased if they did so. He testified he believed that that was what God wanted and he did not want to displease God. He testified that when he participated in the murder of James Thimm he thought that he was doing the right thing.

The defendant's counsel and Andreas illustrated how Ryan used the arm test to determine Yahweh's will. The attorney raised his arm at about a 45-degree angle toward the witness; Andreas stated a question would then be asked and he would try to pull down on the arm. If the arm fell down the answer would be no. If the arm was strong the answer would be yes. Andreas stated he thought he could talk to God in that manner until about 30 days after his arrest. He also testified he had thought Ryan could read minds, so he worried about having "wrong thoughts." He testified that during his residence at the Rulo farm he was not in touch with reality, stating, "There was very little reality that was out there. It was a fantasy world." He testified Ryan had told them that anything he said was the same as if it was written in the Bible. He stated he was fearful at that time that if he displeased Yahweh he would be condemned to burn in hell. Andreas testified Ryan had told them he could "deteriorate someone else's brain," and that he saw the results of what Ryan had done with Luke Stice and James Thimm. He stated he believed Thimm's brain had been deeply affected. Andreas stated Thimm complained very little of his torture, and throughout the ordeal begged Yahweh for forgiveness.

Andreas testified he was told the defendant had accidentally shot Thimm in the cheek; Yahweh had somehow pulled the trigger and caused the gun to fire.

Andreas testified that he was more concerned with Thimm's afterlife, that he would burn in hell, than with his suffering in his physical life. He testified that while he lived on the Rulo farm, the defendant was obnoxious, acted like a mouthy boss' son, and was a messenger and alter ego for his father. He stated he never saw the defendant disobey an order from his father and that he "blindly" followed what Ryan said. Andreas testified the farm had belonged to Rick Stice, who was initially a high priest until he was demoted to slave.

Andreas testified that when Stice was demoted to slave Stice was directed to have sex with a goat. Andreas held the goat while Stice did so.

Ryan was absent from the farm one weekend during the time Thimm was treated as a slave, but Andreas did not free Thimm and take him to Beatrice because Andreas was afraid Ryan would hunt Andreas down and kill him because he had displeased God. Andreas had disked the field to prepare for the burial of Thimm's body. Andreas felt that he had been brainwashed by Ryan, and that is why he had not left the farm for help even though he had access to weapons and transportation. He did not realize that he had been brainwashed until 40 days after he had been separated from the Rulo farm.

It was stipulated that Andreas had entered into a plea bargain with Richardson County and the U.S. attorney, and several counties in Kansas and Missouri, wherein he agreed to plead to three felony counts, with a total maximum penalty of 30 years, in exchange for telling the truth about the occurrences on the Rulo farm.

Andreas testified the younger children on the farm received some schooling at the farm, but the defendant did not participate in it.

Terry Becker, an investigator with the State Patrol, also testified. Becker participated in several searches of the farm near Rulo, Nebraska. The first search was conducted on June 25, 1985, to find stolen property allegedly located on the

premises. The officers cut the lock on the gate and approached the residence. Inside the home Becker observed numerous people, including the defendant's mother. He observed a number of guns and a birthing chair, which Ryan said had been used to deliver Lisa Haverkamp's baby. Becker testified, "There was continuously a gun within reach anywhere in that trailer. There were guns — like fully automatic weapons above each bed in the living quarters. There was a weapon above each doorway. There were handguns on the tables. It was a heavily armed residence." All of the guns were loaded. During this time the defendant was yelling obscenities at the officer from the south trailer, where he was in the custody of other officers.

As a result of the search the officers seized 13 fully automatic AR-15 rifles and approximately $120,000 of merchandise. The property was later determined to have been stolen from counties in Missouri, Nebraska, and Kansas. At the beginning of the search the defendant did not have a weapon on his person but was near a bed which had fully loaded automatic weapons on it.

A second search was conducted on the morning of August 17, 1985, because Rick Stice, a former resident of the farm, reported his son had been killed, and there was concern over the whereabouts of James Thimm. Stice had informed the officer that Thimm had previously been shot through the cheek by the defendant. That same day Ryan and Tim Haverkamp were arrested by the sheriff. On that day only one woman remained on the farm; the others had moved to Norton, Kansas, to the Lynn Thiele residence. More weapons and explosives were seized, as well as survivalist literature. In addition, the bodies of Luke Stice and James Thimm were discovered. The bodies were found after James Haverkamp told other officers that James Thimm had been killed and was buried in an unmarked grave with Luke Stice. The value of the property seized after this search was approximately $5,000, and included handguns, rifles, hand grenades, charcoal, and other chemicals for use in the manufacture of black powder. During this time the defendant was at the Lynn Thiele residence.

Becker testified that when he went there, with a search warrant, and attempted to obtain the weapon which had been

used to shoot into Thimm's body at the gravesite, the defendant was in custody in Kansas by virtue of an arrest warrant issued by Richardson County, Nebraska. The officer interviewed the defendant regarding the bodies found at the Rulo farm. The defendant indicated he knew nothing about any bodies at Rulo. The defendant stated his father had given him the gun which was then retrieved from the Lynn Thiele residence.

Becker testified the defendant had no juvenile record in any jurisdiction.

The State then rested.

The defendant presented testimony by two other men charged in the murder of James Thimm, a psychologist, a woman who works with cult members, and several attorneys.

James Haverkamp, one of the other men charged, testified that he moved to the Rulo farm in June or July 1984 because he then believed Ryan could speak with God and had instructed Haverkamp to move there. He had believed Ryan could talk to God for approximately a year prior to his move. Ryan sometimes spoke to God through Haverkamp's right arm. Haverkamp believed he was an Israelite, a descendant of Abraham, and that his belief was founded in different Bibles and Bible dictionaries. He began to believe he was an Israelite in the spring of 1983 and believed everyone who lived on the Rulo farm was an Israelite, including Luke Stice, until he was told in the spring of 1985 that the Stice boy was not. At that time Haverkamp was told that young Stice was a mongrel, and the boy was punished. The numbers 666 were written on the boy in red ink, and he was not allowed to wear clothes other than underpants for the last 2 months of his life.

Haverkamp testified he did not object to the boy's treatment because he was afraid of being punished and of burning in hell for questioning what God wanted.

Haverkamp testified that Ryan had directed him to probe James Thimm with the shovel handle because that was what Yahweh wanted. He had been told Yahweh wanted Thimm to feel pain because he had denied Yahweh. He believed he was doing God's will when he did so, and did not know how to justify how badly Thimm was hurt. Haverkamp participated in whipping Thimm and shot one of his fingers. Haverkamp

further testified he had participated in kicking Thimm. Haverkamp testified the defendant participated in the torture with the other men. The defendant was above him in rank, and Haverkamp had no say with regard to the defendant's activities. In the fall of 1984 he was told by Ryan that the defendant was considered a man in the eyes of God.

Haverkamp no longer believed he could talk to God through his arm and had stopped believing that about 40 days after he was separated from the Rulo farm by his arrest. His freedom to leave the farm was restricted, but he had not objected to such restrictions because he believed it was what God wanted. Haverkamp testified the defendant helped with the school on the farm on one or two occasions, and spent more time with the children than the other men.

Haverkamp believed he had been brainwashed, meaning he did things there he would not normally have done. For example, even though Haverkamp had previously been a hog farmer, as a member of the Rulo group he was forbidden to eat pork because it was "unclean."

Haverkamp was initially attracted to the Rulo group because of Yahweh and the fear of Armageddon. The men stole batteries, tractors with backhoes, guns, ammunition, and food to prepare for the battle they believed to be imminent. Toward the end of his stay at Rulo things were quite different than when they began.

Haverkamp testified he believed Ryan controlled his free will. When Thimm died he did not worry that he had committed a crime and did not get rid of the evidence. The shovel, for example, was still in the confinement building 4 months later.

Haverkamp testified that Ryan, Rick Stice, and the defendant had reported experiencing visions while at the farm. Haverkamp had not had visions nor heard voices, but Ryan, Stice, and the defendant had reported such experiences. Haverkamp testified he was told Ryan was married to his sisters, Cheryl Gibson and Lisa Haverkamp, and his mother, Maxine Haverkamp, in the eyes of Yahweh. Ryan was also legally married to Ruth Ryan, as far as Haverkamp knew. Haverkamp believed these marriages were what Yahweh wanted. He did not leave the farm for fear of burning in hell

because Ryan had told him that was what Yahweh would do to him. Ryan had announced on December 31, 1984, at a gathering at the farm that if anyone wanted to leave they should do so then because after the first of the year they would not be able to. They had to decide whether to follow Yahweh or go against him. There was an implication that if someone left they would have trouble in the hereafter.

Haverkamp testified he had never seen the defendant go against his father's wishes or question the existence of Yahweh. The defendant actively participated in the Bible discussions held on Saturdays.

Dr. James Cole, a professor of psychology at the University of Nebraska, testified regarding his psychological evaluation of the defendant. Cole had supervised a battery of psychological tests, including intelligence tests, given the defendant, as well as a psychological interview. Dr. Cole reviewed the results of those tests and a report from the State Patrol consisting of statements of Andreas and Haverkamp, and then interviewed the defendant a second time just prior to the hearing.

It was Dr. Cole's opinion that the defendant was functioning at an average or above average intellectual level, but that he appeared to be fairly immature, "particularly emotionally and in terms of general awareness of the world around him." The defendant's responses to the Rorschach test, in particular, tended to illustrate that his level of maturity was more in line with young people's than adults'. Dr. Cole also testified a portion of the defendant's responses showed "pretty good reality contact."

Dr. Cole testified the defendant was "very open and cooperative" during the October interview and had talked a lot about movies, particularly "Red Dawn" and "The Terminator."

Dr. Cole stated his definition of immaturity could be illustrated by the following "synonyms": "[A] kind of naivete, lack of sophistication, a lack of independence of judgment, acceptance of other people's in very absolute and total — other people's views as absolute and total. A lack of questioning of things." Dr. Cole believed the defendant was less independent than a typical 16-year-old. He further testified the defendant

unquestionably accepted the "values, the beliefs, the religion, of his father. . . . He believes in what his father believes in; he believes in the religion very strongly and uncritically." Dr. Cole viewed such uncritical acceptance as a sign of immaturity. Dr. Cole determined, based on the aforementioned testing, that the defendant's age in terms of maturity was that of a 12- to 13-year-old.

Dr. Cole illustrated his view of the defendant's immaturity by relating a question asked by the defendant with regard to "the gangs that wander around campus? . . . Where are they? Can you see them?" Dr. Cole also testified the defendant scored high on the "L" scale. He testified this was consistent with groups of people who tend to have strong and extreme religious views, not because they lie but because they "tend to have very strong absolute beliefs." Dr. Cole assumed the defendant's religious views were not significantly different from those at the time of the murder. That indicated to Dr. Cole the defendant was dominated by a "very strong, very absolute religious system that he believed in very strongly, still believes in very strongly" and that he is guided by "the words of Yahweh in his behavior, and he accepts that unquestionably." Dr. Cole stated the defendant believed it was Yahweh, rather than himself, who pulled the trigger and shot James Thimm in the cheek. The justification for this behavior was because Thimm had apparently denied Yahweh and this act would please Yahweh. Dr. Cole believed the defendant actually believed in the religious beliefs he professed.

Dr. Cole concluded the defendant "admires his father completely; he feels his father is a leader for Yahweh; he believes his father" had spoken at the farm because Yahweh had instructed him to do so. Dr. Cole further testified the defendant viewed his father as a martyr because he was subsequently betrayed by his followers. Dr. Cole viewed the defendant as totally committed to his father and stated that he showed no doubts as to his father's actions.

Dr. Cole testified the defendant seemed even more adamant about his religious beliefs at the more recent interview. At the second interview the defendant seemed to have more anxiety about the events. Dr. Cole testified the defendant had shared a

cell with his father in November and had been very distressed by it. He saw himself and his father as the only remaining believers and saw his whole world crumbling around him.

It was Dr. Cole's opinion that the defendant was "totally under the domination of his father" when he participated in Thimm's murder, and "was not acting on his own free will." Ryan was the single most important influence, but the whole group reinforced his orientation and the violence associated with it. Dr. Cole testified the participation of the adults had some influence on the defendant. It was his opinion the defendant would not benefit by being treated as an adult, but could be rehabilitated through participation in the juvenile system. Dr. Cole testified the success of such rehabilitation was contingent on the role in such a program played by his father. He testified it would be relatively easy for Ryan to undermine the defendant's rehabilitation.

Dr. Cole believed there was a chance the defendant could be rehabilitated if in an adult prison with his father, although he would be very vulnerable.

On cross-examination Dr. Cole testified that at the second interview, the Sunday prior to the hearing, the defendant still believed Yahweh speaks through his father. Dr. Cole had never before encountered a similar situation in his practice, and could only speculate about the length and type of treatment which would rehabilitate the defendant. He recommended placement, after counseling, in a carefully selected, healthy, religious home.

Dr. Cole stated that even if the defendant were separated physically from his father, it was doubtful whether he could be separated from his father's influence. For that reason Dr. Cole believed it was critical to obtain a commitment from his father to support rather than undermine a rehabilitation program. For the defendant to be rehabilitated required his father's support and the defendant to change his beliefs, but neither requirement had occurred. Dr. Cole stated that at his recent meeting with the defendant the latter was not even considering changing his religious beliefs.

Dr. Cole stated the defendant was reluctant to discuss his participation in Thimm's murder, tried to avoid talking too

much about his father, and did not show any remorse for what had happened. The defendant still believed that it was the will of Yahweh, and this belief was even stronger at the second interview. Dr. Cole testified that, for rehabilitation to succeed, the defendant would have to recognize the relationship between his religion and the inhuman behavior which resulted from it, and feel some remorse for his actions, but the defendant did not yet have those feelings. Dr. Cole testified that group membership often pulls people into activities they would normally never do, often macho behavior. In Rulo those pressures were present, plus the additional pressures of God and his father. Dr. Cole testified he was in favor of transferring the case to juvenile court to allow placement in a foster home, even though the placement period required might exceed the scope of the court's jurisdiction.

The defendant's next witness was Priscilla Coates, an executive director of the Citizens Freedom Foundation, a support group for former cult members. Coates testified she preferred the term "destructive group" to cult, and stated such groups have four common elements. Such groups

> recruit defectively; they gain their loyal followers by the use of mind-control or thought-reform techniques; there normally is a living leader who demands, requires, obedience, almost total obedience; and there is something in the doctrine of the group which says that it is all right to break the law.

Coates testified her role in the organization was to serve as a referral resource. She had contacts with cult members as well as other people throughout the country. Coates had obtained information about the group on the Rulo farm from newspaper accounts, talking with individual members, and reading some depositions and literature from members. She had also met and spoken briefly with the defendant. The literature she read included two exhibits received into evidence. She testified the literature espoused a philosophy that was historically incorrect, one based upon the "protocols of the elders of Zion." Cole testified that her research revealed such "protocols" had never existed, but a document bearing that title was written in 1864 as a satire of Napoleon III. It was later rewritten and attributed to

Maurice Jolly, and was supposed to be a conversation between Machiavelli and Montesquieu, having nothing to do with Judaism, Jewry, or anything related. Later, it was plagiarized and used in "a trashy German novel." It was then plagiarized again and printed in Russia in the early 1900s. At some time between 1905 and 1917, she testified, "it was said to be the secret minutes of a secret meeting of the elders of Judaism or Zionism." The essence of the minutes was some sort of plan to rule the world, which became the basic philosophy of the Posse Comitatus, even though it began as a joke in 1864.

Coates testified the element of mind control was present at the Rulo farm, in that the members were isolated and there was a kind of group paranoia. She viewed their quest to please Yahweh as part of the mind control on the farm. Coates testified Ryan was the "living leader" of the group, and the fourth factor, illegal acts, was also present. She stated people who have been involved in such groups can be "deprogrammed" through an educational process.

Coates testified she had been given, and had perused, a copy of Mike Ryan's Bible which he had edited and customized for use on the farm. The "Bible" had been extensively revised, and there were places where the meaning of a Bible verse had been reversed by changing the word "good" to "bad." Coates testified a revised Bible is often used in religiously oriented destructive groups and is one method of mind control. Coates testified she viewed nonleaders of such groups as victims of circumstance and deception. She testified there are special problems in rehabilitating children involved in such groups because they have "no life experiences to which they can return. All that they know is the group." She stated rehabilitation of such children is possible, but difficult. It was her opinion the type of isolation experienced by the defendant was devastating. In her opinion an average length of time people such as the defendant require counseling is from 6 months to 2 years.

Coates had spoken with the defendant for about 30 minutes the morning of the hearing. It was her impression the defendant was very concerned about and afraid of Yahweh.

The next witness to testify was Rick Stice. Stice testified the Ryan family moved to his farm near Rulo in the summer of

1984. He testified that at that time he believed he and Ryan could talk to Yahweh. Stice testified that at one time he believed Yahweh had made him a high priest and the spirit of the Archangel Raphael lived within him. He also testified he believed at that time that he could talk to Yahweh in his mind. He was demoted to the status of slave, without explanation, in February or March 1985. He further testified that in March 1985 his son, Luke Stice, began to be abused by some of the others on the farm. He testified Ryan had told him the abuse was directed by Yahweh. Luke was physically punished during the entire month of March. Ryan left the farm for a weekend around the 10th of that month. Stice then left the farm but did not take his son, even though he had already been abused. Stice returned to the farm voluntarily 7 days later, and his son was killed about 2 or 3 weeks later, after further abuse. Stice admitted abusing his son during that time. He stated he participated because his life and those of his other children were threatened, as well as facing threats of eternal damnation. After his son's death, Stice again left the farm but left his two other children there because they were not in any danger. He did not report the murder because he was afraid of Yahweh. Stice testified he still believed in Yahweh and had had visions since leaving the farm, but had not tried to talk to Yahweh. Stice testified that while he lived on the farm he believed in the imminent approach of Armageddon, and that he was one of those chosen to lead the fight against evil. He testified he still believed Armageddon would occur, but now kept it to himself. He no longer believed Ryan had the Archangel Michael or could speak with Yahweh, although he had believed it while he lived on the farm. After he had been separated from the farm for almost 3 months, Stice realized Ryan could not talk to Yahweh. Stice thought he had been brainwashed while on the farm.

Stice stated he had entered into a plea agreement whereby he agreed to cooperate with authorities in exchange for being charged with one federal felony.

Stice testified that when he left the farm on March 10, 1985, his son was clad only in his underwear, had been separated from his siblings, and was living with adults only. When Stice escaped

he had been living with his son in the south trailer.

The next witness was Victor Faesser, one of the defendant's attorneys. He identified and sponsored several school records and records of phone conferences with former schoolteachers of the defendant. He testified he had spoken with the director of the Youth Development Center at Kearney and was told of the counseling and rehabilitation measures used there. He was told they use a group-therapy program, based on peer groups, which is very successful. He further testified the institution has an educational psychologist on its staff.

On cross-examination Faesser testified he had had prior contact with the workings of the juvenile system and understood such jurisdiction terminates when a juvenile reaches the age of 19. He further testified the release decision is an administrative decision, over which the courts have no jurisdiction.

The defense then rested, and the State called a rebuttal witness, Jeff Clausen. Clausen is a juvenile parole officer for the Nebraska Department of Correctional Services. His job involves supervising juveniles once they are paroled out of the Youth Development Center at Kearney. In his experience, a youth offender is generally confined at Kearney for an average stay of 7 to 8 months. The juveniles then may be supervised by a parole officer until they are 19, but are usually supervised for only 6 months if they "perform well." Clausen testified he was familiar with the counseling services available both at Kearney and at the correctional center in Lincoln. He testified both institutions provide the same type of counseling. It was his experience that youthful offenders were generally kept at the correctional center, and are segregated from the older offenders. He testified the term "youthful" applied to offenders aged 17 and older. He estimated the majority of the prison population at that facility were in their 20s.

Clausen testified that he felt his program could benefit juveniles up to the ages of 17½ to 18 years of age. He testified that once a juvenile reaches the age of 19 he is automatically discharged without any continuing supervision.

Based on the evidence which has been summarized, the trial court found that a sound basis existed for the court to retain

jurisdiction of the defendant's case. The findings may be summarized as follows:

The trial court found that the types of treatment the defendant would most likely be amenable to were available in the juvenile court as well as adult court but that certain types of treatment available in adult court would not be available in juvenile court. The court found this consideration weighed in favor of retaining jurisdiction.

The trial court next found the alleged offense included violence and was committed in an aggressive and premeditated manner, another factor which the trial court found weighed in favor of retaining jurisdiction. The trial court found the apparent motivation for the commission of the offense was religious or cult fanaticism, which, according to the evidence presented at trial, was still present in the defendant and weighed in favor of retaining jurisdiction.

The trial court also found that the defendant's age of 16 years and the fact the others involved were adults weighed in favor of retaining jurisdiction.

The trial court further found the defendant did not have a previous juvenile or criminal record but that the defendant did have a previous history of antisocial behavior connected with his religious or cult fanaticism. The trial court further found there was evidence that rehabilitation might be difficult because of the defendant's inability to relate to the real world, another consideration which favored retention.

The trial court also found that there was evidence the defendant had the maturity of a 12- or 13-year-old, which might mean it would be very difficult to rehabilitate him while under the jurisdiction of the juvenile court and before he attains the age of 19, another consideration which weighed in favor of retention.

Finally, the trial court found that the best interests of the juvenile and the security of the public required custody or supervision extending beyond the defendant's minority, which weighed in favor of the retention of jurisdiction.

The defendant contends the evidence does not support the trial court's findings. The defendant argues the trial court implied, in finding No. 1, that the defendant was amenable to

treatment in the juvenile system, and therefore that criterion must be held in favor of the defendant. The defendant further argues that finding the offense was violent does not automatically mandate retention in the district court; that the defendant's membership in the cult was the result of his parent's actions rather than his informed choice, and therefore the third finding should weigh in his favor; that due to the influence of the adults in the perpetration of the offense, the fourth criterion should weigh in his favor; that since rehabilitation possibilities were presented and the defendant had no prior record, the fifth consideration weighed in his favor; the defendant's maturity level and treatment required the trial court to find in his favor on the sixth criterion; that since the court found there were juvenile programs available, the seventh consideration weighed in his favor; that there was no showing of a threat to the public by allowing the defendant to be treated as a juvenile; and, finally, that the court failed to make any findings with regard to criterion No. 9. The defendant argues the disparity in treatment between the defendant and others involved in the crime is a factor which weighs in favor of transferring the case. Finally, the defendant argues the State failed to establish a sound basis for retaining jurisdiction in the adult court.

The State contends the trial court fully complied with all of the statutory requirements for the juvenile transfer hearing, and its decision was supported by the evidence presented at the transfer hearing. The State contends the record shows the trial court's findings were proper and supported retention.

The record shows the trial court informed the defendant of his right to request waiver to the juvenile court and held an evidentiary hearing at which the county attorney and the defendant presented evidence on the issues pursuant to Neb. Rev. Stat. § 29-1816 (Reissue 1985). The trial court then considered the relevant statutory criteria, determined a sound basis existed for retaining jurisdiction, and set forth its findings. § 29-1816. In making the findings the court considered the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1984).

Section 43-276 requires a consideration of the following criteria:

(1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court . . . and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult . . .; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

In *State v. Alexander*, 215 Neb. 478, 486, 339 N.W.2d 297, 301 (1983), we considered these statutory requirements. We there stated:

> In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-202.01. There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. . . . [T]he court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of § 43-202.01 disclose a balancing test by which public protection and societal

> security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] "Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system."

(Quoting *State in the Interest of C. A. H. & B. A. R.*, 89 N.J. 326, 446 A.2d 93 (1982).) As a result, some youths will be held accountable as adults so that future antisocial misconduct can be effectively deterred.

We then applied the balancing test to the facts of that case and upheld the retention of jurisdiction. The case involved a 14-year-old boy who had been charged with first degree murder, robbery by violence, and terroristic threats. The murder victim was an 80-year-old man who had been beaten to death by the defendant. The defendant had a lengthy juvenile record, had been diagnosed as significantly immature, functioned at an average intellectual level, and had a sustained rule-breaking pattern of behavior. At the evidentiary hearing evidence was presented that there was some chance of rehabilitation, which would possibly require many years of treatment.

Similarly, in *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985), the retention of jurisdiction of a 14-year-old boy was upheld by this court. Broomhall had attacked, brutally beaten, and sexually assaulted a woman. In *State v. Selman*, 204 Neb. 833, 285 N.W.2d 832 (1979), a 14-year-old boy was tried as an adult for shooting with intent to kill, wound, or maim. Selman had a lengthy record, and we found sufficient evidence in the record to support retention. In *State v. Moore*, 209 Neb. 88, 306 N.W.2d 183 (1981), a 14-year-old boy was tried as an adult and sentenced to life imprisonment for his role in the death of an Omaha cabdriver. The boy and his brother had instructed the driver to take them to an isolated area, where they robbed him and the older brother shot him. The defendant's argument that he was under the influence of his older brother was found to be unpersuasive, and the retention was upheld.

The standard of review applicable to an appeal from a denial of waiver to juvenile court is abuse of discretion. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

We find the district court did not abuse its discretion in retaining jurisdiction. All of the statutory provisions concerning transfer hearings were fully complied with. The record supports the trial court's findings that the crime was violent and the defendant may require treatment beyond the age of majority. Further, the nature of the offense and the defendant's beliefs at the time of the hearing were such that the defendant's rehabilitative needs were beyond the scope of the juvenile court. Further, more protection of the public was required than is available in that court. The defendant's first assignment of error is therefore overruled.

The defendant next contends the trial court erred in receiving certain photographs into evidence which, he contends, were so gruesome that the prejudicial effect of the photographs exceeded their probative value. The defendant argues the photographs did not illustrate or clarify the only controverted issue involving the autopsy: ante mortem versus post mortem injuries. The defendant argues the photographs were cumulative evidence and that the pathologist's testimony alone would have sufficiently described the victim's injuries. The defendant further argues the pathologist could have testified adequately without the photographs.

In support of this contention the defendant relies on *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977). In that case we stated that all of the circumstances of each case must be considered in determining the admissibility of photographs, including whether a witness, particularly a pathologist testifying about an autopsy, can adequately testify without them. The defendant also complains about the introduction of a photograph showing the victim alive and healthy, arguing the photograph was unnecessary and its stark contrast with the other photographs of the victim was unfairly prejudicial.

The State contends the photographs were introduced to prove the State's case. The State relies on *State v. Lynch*, 215 Neb. 528, 535, 340 N.W.2d 128, 133 (1983), where we stated, "Gruesome crimes produce gruesome photographs.

Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime." The State further argues the admission of evidence is within the sound discretion of the trial court and that photographs are admissible to show the condition of the body, the nature and extent of wounds and injuries, and to establish malice or intent. See, *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). The State argues the defendant's malice or intent with regard to the crime was at issue in the case, and proof of such elements was crucial.

The State then explains the relevancy of each photograph as follows. Exhibit 19 is a full-length view of the victim's body wrapped in the sleeping bag prior to the autopsy. The State contends the photograph was introduced to show the condition of the body when found. The State contends the photograph was not gruesome or inflammatory because the body is not visible.

Exhibit 24 is a full-length view of the victim's body prior to the autopsy. The State contends the photograph was introduced to show the condition of the body and aid in its identification. Exhibit 27 shows the victim's back and was introduced to show the linear bruises described by the pathologist.

Exhibit 28 depicts the victim's buttocks, illustrating the condition of the body and the extent of an injury allegedly inflicted by the defendant. Exhibit 29 is a closeup of the victim's hand, introduced to show the injuries sustained on that limb. Exhibit 30 depicts the victim's broken thigh bones, again introduced to show the extent of an injury allegedly inflicted by the defendant.

The State cites several cases in which the admission of certain photographs was upheld despite their contents. See, e.g., *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (photographs of skull and torso of victim); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982) (photographs of dismembered body).

At the trial the State presented testimony by a pathology assistant, a pathologist, and the victim's sister to sponsor the photographs at issue.

David Hamilton, a pathology assistant with Pathology Medical Services in Lincoln, testified concerning the custody of the victim's body prior to the autopsy. Hamilton testified that exhibit 19 depicts the appearance of the body still wrapped in the sleeping bag prior to the autopsy. Hamilton testified as to the various details of the appearance. Hamilton then testified that exhibit 24 depicts an adult body, partially decomposed.

Dr. George Gamel, the pathologist who conducted the initial autopsy, then testified. Dr. Gamel also testified that exhibit 19 depicted the victim's body lying in a sleeping bag prior to the autopsy. He further testified that exhibit 24 depicted the body after it had been removed from the sleeping bag. Dr. Gamel testified he first noted the body had undergone extensive decomposition. His external examination revealed the head had been extensively injured; the chest had been crushed; the anus had been injured; the back had linear bruises, as from a beating; the genitals were missing; both legs were broken at thigh level; most of the skin on the right lower leg was missing; the fingertips of the left hand were damaged; and the left wrist or forearm was broken. Baling wire was wrapped around the wrists and ankles.

Dr. Gamel testified that the photographs of the body introduced into evidence depicted the various injuries.

At that point the jury was dismissed and the trial court heard the defendant's objections to the introduction of the photographs depicting the victim's body. The defendant objected to their introduction on the grounds the photographs were so prejudicial that any probative value was outweighed by that prejudice.

Dr. Gamel testified that due to the process of decomposition, even gross exterior observations were difficult for a professional. Dr. Gamel testified the photographs illustrated the broken bones very well, but the soft tissue injuries were difficult to see. Dr. Gamel testified a second autopsy had been performed, and the only area of disagreement between the pathologists was as to which injuries were inflicted before the victim's death.

The trial court had previously ruled the photographs were not admissible unless they were introduced to illustrate the

pathologist's testimony. Dr. Gamel, asked a foundational question, testified there were no injuries which he could not orally describe to the jury.

Dr. Gamel then testified that exhibit 30 shows the broken thigh bones and exhibit 29 the injury to the left hand; neither photograph dealt with a soft tissue injury. He testified that exhibit 28 illustrated the victim's dilated anus. He then testified the photographs depicted the injuries described in his testimony and would assist the jury in determining what those injuries were. Dr. Gamel testified that exhibit 27 depicted the linear bruises on the victim's back, which exhibit, in his opinion, would help the jury get a better idea of the injury. He further testified exhibit 24 would assist the jury in ascertaining the condition of the body. Dr. Gamel further testified that exhibits 27, 28, 29, and 30 would assist him in depicting the injuries to which he was testifying. He further testified the exhibits were accurate depictions of the injuries.

The court asked Dr. Gamel if the pictures were repetitive or depicted separate injuries. The witness replied that each picture showed a separate injury. The court then received the photographs into evidence and overruled the defendant's motion for a mistrial.

Dr. Gamel testified he believed the linear bruises depicted on exhibit 27 had been caused by a blunt stick or whip. Dr. Gamel testified that exhibit 28 shows the dilated anus of the victim. Dr. Gamel testified that the leg fractures depicted in exhibit 30 were caused by a blunt-force injury of some type. Dr. Gamel testified the left arm was also broken by a twisting or blunt force. Dr. Gamel testified that a metallic foreign body was found lodged in the skull when the skull was x-rayed.

Dr. Gamel testified that an internal examination of the body revealed the head was extensively damaged, and there was a gunshot wound in which the shot had entered the right cheek. The entire left side of the skull was shattered into multiple small fragments. Dr. Gamel testified this damage could have been caused by a second gunshot on the left side of the skull. It was his opinion the injury on the left side of the skull was caused by either a gunshot or blunt-force injury.

Dr. Gamel testified that many of the victim's ribs were

broken, and one rib was protruding into the chest cavity. Blood was found in the right chest cavity, which the witness believed was probably caused when the injuries occurred.

Dr. Gamel testified a blunt object had been inserted into the anus and pushed far up into the body cavity. He suspected the object had damaged the left lobe of the liver.

Dr. Gamel testified the victim's genitals were missing, and it was difficult to determine the cause. It was his opinion it was "most likely" they had been cut away. There were some sharp edges in that area which suggested removal had occurred before the body was buried. Dr. Gamel then testified that some of the skin on the right lower leg had been stripped off.

Dr. Gamel testified that the second pathologist who examined the body, Dr. Eckert, believed there had been two shots to the head, had found about one-half cup of grain in the victim's stomach, and had pointed out the left lobe of the liver was abnormal. It was Dr. Gamel's opinion the victim died of multiple traumatic injuries. He testified the gunshot wound or wounds in the head would have been fatal, and he could not determine whether the victim was then alive. Secondly, the crushed chest injury would have been fatal, and death would have occurred within minutes after such an injury. Dr. Gamel believed it was probable the victim was alive during the chest injuries. Dr. Gamel testified the broken thigh injuries would have been fatal due to shock, after a period of time. Dr. Gamel was unable to determine with certainty whether the victim was alive when his legs and arm were broken, but he suspected the victim was alive when his legs were broken. He testified it was most likely the victim was alive when the anal injury occurred.

Dr. Gamel testified the broken arm could have caused death in conjunction with the victim's other injuries, and the injury to the anus would have caused death eventually. Although the injuries to the victim's hand would not have been fatal, the whipping caused injuries on the back which could have been fatal.

Miriam Kelly, the victim's sister, was then called as a witness for the State. She testified that exhibit 9 was a photograph of the victim which accurately depicted his appearance in 1984. The defendant objected to the introduction of the exhibit on the

grounds of relevance and prejudice. The exhibit was received into evidence.

As we stated in *State v. Jones*, 213 Neb. 1, 8, 328 N.W.2d 166, 171 (1982), "The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect." (Citing *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978).) We further cautioned that the probative value of gruesome photographs must be carefully weighed by the trial courts, which must determine the relevancy of the photographs and weigh their probative value against their potentially prejudicial effect. In that case we upheld the admission of photographs which depicted the brutal murder of a mother and daughter. The photographs showed the condition of the bodies prior to the autopsy and showed the causes of death, and the pathologist testified the photographs aided his testimony.

In *State v. West*, 223 Neb. 241, 248, 388 N.W.2d 823, 830 (1986), we upheld the admission into evidence of photographs of one of the victims. We there stated the photographs

> helped the jury to visualize the crime and view described events in proper context. The fact that a photograph might present a gruesome spectacle does not prohibit its admission in evidence. *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).
>
> In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

We then found that the photographs at issue, in conjunction with the testimony of the examining pathologist, served those purposes.

Similarly, several gruesome photographs of a homicide victim were held admissible in *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). The pathologist referred to the photographs in the course of his testimony about the nature and location of the wounds and the cause of death. We held the photographs were relevant because they tended to correlate the

victim's wounds with the defendant's knife. We there stated at 535, 340 N.W.2d at 133, "These photographs show a series of systematic, sadistic, and savage slashes in the victim's throat—visual proof from which a jury could reasonably infer that the homicide was committed with 'deliberate and premeditated malice.' " Illustration of the wounds in conjunction with the pathologist's testimony, that is, the location, number, and nature of such wounds, supplied evidence to prove the cause of death assigned by the pathologist. Generally, relevant evidence regarding causation of death in homicide cases is admissible, and the photographs in question were admissible under the circumstances. Gruesome crimes produce gruesome photographs. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice. We then found the photographs had probative value regarding the elements the State had to prove, and upheld their admission.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), we upheld the admission of photographs depicting the victim of a brutal beating. We there stated that in determining admissibility the trial court must consider all the circumstances of the case, including whether a witness can effectively testify to the pertinent facts without the need of numerous photographs, or any photographs at all. In *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1970), we stated a gruesome photograph may be admitted if it makes clear some controverted issue in the case.

Our review of the record shows that the trial court did not abuse its discretion in admitting these photographs. While five of the photographs were gruesome, they were utilized by the pathologist to illustrate his testimony concerning the condition of the body and the nature and extent of injuries sustained by the victim. They were also pertinent to a controverted issue in the case: the disagreement regarding whether certain of the injuries occurred before or after death. Further, the photographs helped the jury to visualize the enormity of the torture, from which an inference regarding the defendant's participation could be drawn. The introduction of a picture of the victim shortly after his move to the Rulo farm was also proper, as it was used to identify him. This assignment of error

is overruled.

The defendant next contends the trial court's failure to admit relevant evidence denied the defendant his right to a fair trial. In particular, the defendant contends the depositions of Norbert and Maxine Haverkamp and evidence of the defendant's parents' prior sexual relationship with Sherry Kidd should have been admitted so that the jury could fully evaluate the defendant's mental state.

The State contends the trial court properly excluded that evidence after carefully weighing the interests of the defendant and his codefendant, Ryan. Ryan had objected to the introduction of the Haverkamp depositions on the grounds of relevancy, prejudice, insufficient foundation, and infringement of his constitutional rights. Michael Ryan objected to Sherry Kidd's testimony on the grounds of prejudice and relevance. The State further argued the defendant did not establish a connection between his mental state and his parents' relationship with Sherry Kidd because, at trial, Mrs. Ryan testified the defendant was probably not aware of the Ryans' relationship with Sherry Kidd because an effort had been made to hide it.

The depositions of Maxine and Norbert Haverkamp are in the record, and we have examined them. Norbert Haverkamp testified he had not spoken with any of the people who had lived at the Rulo farms about the victim's death. He further testified his wife did not inform him of the occurrences on the farm, or of the deaths. He had not visited the Rulo farm since June or July of 1984, and did not visit the farm after that time because his wife and son had told him he would be killed if he tried. The members of the group refused to talk to him after the middle of August 1984, except that Jim Haverkamp would talk to him about the children. Norbert Haverkamp had never talked much with the defendant, and had no direct contact with Michael Ryan from August 1984 until approximately August 1985. He had no personal knowledge of any of the events that occurred on the farm between August 1984 and August 1985, and had not been brainwashed.

Maxine Haverkamp testified that she believed she had been brainwashed. She believed Michael Ryan could talk to God,

and also believed in the arm control test. She had not seen the accidental shooting of James Thimm, although she was on the farm that day. She further testified she had not spoken with the defendant on that date or subsequently, and had only spoken with Ryan about the incident. She testified that Ryan had told her that Yahweh made the gun go off. Mrs. Haverkamp was unsure whether she was on the farm during the time James Thimm was tortured, murdered, and buried. Later, she was told that it had occurred, or she overheard the two defendants laughing and talking about whipping Thimm. None of the participants in the murder told her what had happened until after her son was arrested. She testified Ryan had controlled their minds by suppressing all forms of self-expression, had constantly criticized and denigrated their beliefs and opinions, and had yelled at them and made fun of them.

The trial court reviewed the depositions and sustained Ryan's objection to their admission. The defendant's attorney had testified the Haverkamps had avoided service of process, in an attempt to show unavailability in support of the introduction of the depositions. The State conceded the two Haverkamps had been told by the State that they would not be called as witnesses and, when they were told they would be called for the defense, had disappeared. A certified copy of the sheriff's return, showing the witnesses were not found, was received into evidence. The defendant argued proper foundation for the two depositions had been laid. His codefendant objected to the admission on the grounds the testimony was not relevant to Dennis Ryan's defense, the defense had failed to show good-faith efforts to produce the witnesses, the introduction of the testimony would violate Ryan's right to confront his accusers, the prejudicial effect of the testimony would outweigh its probative value, and insufficient foundation had been laid to connect the testimony with the defendant's mental condition. The State further argued Norbert Haverkamp had not been on the farm from August 1984 to August 1985, and the testimony of both contained much uncharged misconduct against the codefendant.

The defendant's attorney argued there was no violation of Ryan's confrontational rights because his attorney had

vigorously cross-examined both witnesses during the depositions. The defendant contends the testimony was relevant to show Ryan's dominance of the situation, the mind control he exerted over the deponents, and the testimony concerning brainwashing.

The defendant also attempted to introduce testimony by Sherry Kidd as to an adulterous relationship she had previously engaged in with the defendant's parents. Ryan's attorney objected to this testimony on the grounds that it contained uncharged misconduct and was not relevant. The relationship had occurred 6 years prior to James Thimm's death. The trial court stated it would sustain the objection unless the defendant could lay some foundation for the testimony. The court then stated it would permit the witness to testify as to the defendant's character, but not as to the witness' relationship with Ryan. The trial court stated that her testimony was not relevant unless the defendant produced some testimony making the defendant's early years relevant to his insanity defense. The defendant then made an offer of proof, and the State joined Ryan's counsel in objecting to the testimony on the grounds it was not relevant. The trial court sustained the objection, but told the defendant the witness could be recalled if some connection was shown between the defendant's insanity defense and his family situation during the time of the relationship.

The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court. Neb. Rev. Stat. § 27-104(1) (Reissue 1985). The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion. *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). See, also, *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by unfair prejudice. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides for the exclusion of some character information when used to prove the character of a person and show that person acted in conformity with that character. Whether evidence of previous conduct is not relevant

because of remoteness or lack of similarity is a matter within the sound discretion of the trial court. *State v. Keithly*, 218 Neb. 707, 358 N.W.2d 761 (1984). Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence. Neb. Rev. Stat. § 27-401 (Reissue 1985).

We find the trial court did not abuse its discretion in excluding the Haverkamps' depositions and Sherry Kidd's testimony. Norbert Haverkamp testified he was not "brainwashed" by Michael Ryan and had not been on the Rulo farm for some time prior to Thimm's murder. He had no personal knowledge of the occurrences on the farm or the defendant's participation therein. The defendant made no showing as to the relevance of this testimony, and we find it was properly excluded.

The deposition of Maxine Haverkamp presents a somewhat closer question. She was present on the farm during the months prior to the murder, and possibly was on the farm when the murder occurred. She believed she had been brainwashed, had some personal knowledge of some of the occurrences at the farm, and had some idea of Ryan's role therein. However, her testimony was not crucial to the defense, because it was duplicative of testimony given by other members of the group and would have provided cumulative evidence only. We find the trial court did not abuse its discretion in excluding this testimony.

Finally, we find that Sherry Kidd's testimony was properly excluded. There was no showing by the defendant of any connection between Kidd's relationship with his parents and his mental state at the time of the murder. Hence, this testimony was not relevant to the defendant's insanity defense and was properly excluded.

The defendant next contends the trial court erred in refusing to give two jury instructions. The defendant has only presented argument concerning one jury instruction. Accordingly, the assignment of error concerning the other omitted instruction will not be addressed. See *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The requested instruction which was briefed and argued was instruction No. 4. It stated:

> To be an aider and abetter one must knowingly and voluntarily and with common intent with the principal unite in commission of the crime.
>
> If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated or moved him to act.

The defendant argues there was evidence presented to support this instruction in the form of testimony which tended to show he did not share his father's intent to kill, but instead intended only to please Yahweh. The defendant argues that had this instruction been given the defendant could have been found guilty of manslaughter, as that crime does not require proof of a specific intent to kill. It is the defendant's position that there was an absence of specific intent, due to insanity or his mental condition caused by brainwashing, which theory formed the basis of his defense, and that denial of this instruction prejudiced the defense. He further argues that since no comparable instruction was given, the denial of the instruction constitutes prejudicial error.

The State contends the instruction was properly rejected because it did not accurately state the law in Nebraska and, further, that instruction No. 12, which was given, does correctly state the law. The State also contends the defendant waived the review of this issue because he did not object to the jury instruction when given. The State further contends the instructions, when read as a whole, properly submitted the case to the jury and that the defendant has failed to show he was prejudiced by the instructions given.

Instruction No. 2 stated the defendant had been charged with purposely and deliberately, and with premeditated malice, killing James Thimm. It further stated the defendant had entered a plea of not guilty to the charge and that it was the jury's duty to determine the verdict. The jury was instructed to separately determine the guilt of each defendant. The jury was instructed, in instruction No. 7, as to the elements required to find the defendant guilty of first or second degree murder, manslaughter, not responsible by reason of insanity, or not

guilty. In each murder and manslaughter instruction the jury was instructed that the State had the burden to prove the defendant killed the victim alone or while aiding and abetting another. The jury was instructed as to the insanity defense. An instruction concerning the intent required for the degrees of murder charged was given. An instruction was given in which "purposely," "deliberate," "premeditated," and "malice" were defined.

Instruction No. 11 explained that intent was a material element of the crime charged against the defendant. It further stated the jury was required to determine the defendant's intent from all of the facts and circumstances in the record. It also stated that intent is not a material element in the offense of manslaughter.

The last paragraph of the instruction provided:

> Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself . . . had the required intent. If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him . . . .

The jury was also instructed, in instruction No. 12, concerning the elements required to prove aiding and abetting.

The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Further, all of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.

At trial the defendant objected to instruction No. 7 because the element of aiding and abetting had not been added and the requested insanity instruction had not been incorporated. The defendant did not object to instructions Nos. 11 or 12, nor the exclusion of proposed instruction No. 4. The court rejected all of the proposed instructions which were inconsistent with those adopted by the court. The defendant did not object to this

ruling. Therefore, the issue regarding this instruction is not properly before us.

Moreover, our review of the record reveals no prejudice resulted to the defendant because of the jury instructions given. The jury was adequately instructed as to all of the relevant issues, the material elements of the crimes with which the defendant was charged, and the necessary instructions to explain the defendant's theory of the case. Instruction No. 12 correctly advised the jury concerning the intent required to prove the defendant guilty of aiding and abetting in the murder. See *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied* 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977). That instruction included the portion of the defendant's requested instruction concerning the effect of a difference in intent between a principal and an aider. These instructions, when read together, fairly and accurately submitted the case to the jury.

The final issue to be addressed is the defendant's contention that the trial court abused its discretion in sentencing the defendant to the maximum term possible for his conviction of second degree murder. The defendant contends this sentence is excessive and relies on *State v. Foutch*, 196 Neb. 644, 646, 244 N.W.2d 291, 292 (1976), where we stated a sentence should not exceed "the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant." The defendant argues certain criteria this court has considered in reviewing sentences weigh in favor of a lesser sentence, including

> family ties, age, mentality, education, experience, and social and cultural background . . .; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for reform or recidivism.

State v. Etchison, 188 Neb. 134, 137-38, 195 N.W.2d 498, 501

(1972).

The defendant argues his age, character, the nature of and motivation for the offense, his rehabilitative needs, and the protection of the public, when considered, show the sentence is excessive. The defendant places much weight on the alleged domination exerted upon him by his father, the isolation of the farm, and the fact that the defendants in several other cases received sentences of less than life imprisonment for committing second degree murder. The defendant further argues the trial court placed undue weight on the crime itself and the need to protect the public.

The State contends there was no abuse of discretion shown in sentencing the defendant to life imprisonment. The State argues the sentence is within the statutory limits and, absent a showing of abuse of discretion, should be affirmed. The State contends the trial court considered the relevant factors in imposing the sentence and properly placed great weight on the seriousness of the crime.

The defendant was convicted of second degree murder, which is a Class IB felony. Neb. Rev. Stat. § 28-304 (Reissue 1985). It carries a maximum penalty of life imprisonment and a minimum of 10 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985). The sentence imposed is within these statutory limits.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987). Moreover, the relevant question before this court is whether the defendant received an appropriate sentence, not whether someone else in a different case received a lesser sentence.

Our review of the record reveals there was no abuse of discretion in imposing the maximum sentence in this case. While the defendant contends his age, the isolation of the farm, and the influence of his father tended to create a type of mental illness described as folie a deux or shared paranoia, there was competent evidence presented from which the trial court could have inferred the defendant understood the nature of his acts and consciously chose to participate in the torture of James Thimm. In fact, there was evidence that the defendant enjoyed

participating in the torture of Thimm and laughed and bragged about the fact that he had helped to kill him.

The State presented testimony by Dr. Emmet Kenney as a rebuttal witness. It was Dr. Kenney's opinion that the defendant was not suffering from a mental illness at the time of the murder. He found no evidence in the defendant of neurosis or psychosis. It was his opinion the defendant understood what he was doing, understood the quality and nature of his acts, and had the capacity to distinguish between right and wrong at that time. Dr. Kenney further testified it was his opinion the defendant knew his acts were wrong and punishable. He further testified the defendant had sufficient mental capability to intend the obvious and probable consequences of his acts and could have formed a willful and corrupt intent. Dr. Kenney testified that, based on his evaluation of the defendant, the defendant was not suffering from a dependent personality disorder at the time of the offense. He testified the defendant showed a normal amount of dependency for a 15-year-old and, based on information concerning his participation in the group and his competitiveness, concluded he was not overly dependent.

The witness disagreed with the defendant's expert witnesses, who had diagnosed the defendant as suffering from the condition known as folie a deux or shared paranoia, although he testified it was his opinion that Ryan did suffer from a paranoid personality disorder. The witness testified he had been involved with members of various cults in his professional capacity, including those claiming to have been brainwashed, and testified he saw no evidence of brainwashing in the four people he saw from Rulo. Dr. Kenney testified he would not describe the group at Rulo as a cult but as an adult criminal gang, because the group functioned as a group engaged in a significant amount of criminal activity.

Dr. Kenney testified that, in his opinion, the defendant's maturity level varied from hypermature, or beyond his years, in his attitude of himself as a leader and his idea of appropriate friends, to immature in the area of social development. *Dr. Kenney concluded the defendant became involved in the torture of James Thimm because he derived pleasure from sadistic*

behavior. Dr. Kenney testified that the defendant enjoyed the farm life, described it as a "blast," and was "critical of people who tried to make it look as if it were an unpleasant place." He saw no evidence of serious psychiatric illness such that would produce a delusion in the defendant. It was his opinion the members of the group used the arm test and their religious beliefs as a way of gaining status and giving status within the group. Dr. Kenney testified that in such a group

> the leader has no real qualifications usually for leadership, so he controls his group by either allowing them special privilege with him, and he keeps them in line in one of two ways — what we call crowing on them — you know, mocking them, putting them down, humiliating them — or cutting them out of the group . . . .

Dr. Kenney testified that, in his opinion, the defendant's belief in Yahweh was probably sincere and that he probably believed such a belief entitled him to membership in a special group, and, as long as he went through a ritual, he could do illegal and cruel things. Dr. Kenney stated such a belief would be attractive to a person the defendant's age. Dr. Kenney testified that while the defendant probably subscribed to the attitude of the group, he also knew what the law was at the time. It was his opinion the defendant made up stories about his "visions" to gain status with the group. He characterized the group's belief system as self-serving. He questioned the defendant's theory that he was completely dominated by his father, because, according to the defendant's own version of the facts, there were a number of times people, including the defendant, had disobeyed Ryan. Dr. Kenney also testified it was his understanding that when Ryan left the farm, the defendant and Tim Haverkamp did not follow Ryan's orders, but behaved more aggressively in their treatment and punishment of the other members.

Four mental health experts testified on the defendant's behalf, giving their opinions as to possible diagnoses of the defendant's mental health and his capacity to appreciate the nature of his actions at the time of the offense.

Dr. Herbert Modlin testified it appeared the defendant enjoyed being assigned a weapon while on the farm. The

defendant had indicated he was "reasonably content with this kind of life. He didn't see anything very much wrong with it." Dr. Modlin testified the defendant was well able to keep in contact with reality during that time. It was his opinion the defendant's maturity level was more like a 12-year-old's than a 16-year-old's, and diagnosed the defendant as suffering from a dependent personality disorder. He testified such a disease is treatable "[t]o some extent," and the prognosis is enhanced by the defendant's youth. It was his opinion the defendant should be "deprogrammed" to rejoin general society and that such treatment would be long term, requiring some number of years. It was his belief the personality disorder played an important role in the defendant's participation in the torture-murder, and resulted in his following the group. Dr. Modlin testified that the defendant had apparently believed he was doing the right thing by following Yahweh's orders. Dr. Modlin testified it was his belief the defendant did not pose a further danger to the community because his participation was directed by his father. He further testified the defendant did have a tendency to follow and could fall into some other kind of cult or belief in the future and again be led down the wrong path. Dr. Modlin testified there was no evidence the defendant suffered from paranoia or schizophrenia, and stated "this kid is well put together." Dr. Modlin could not testify to any particular reasons to support his opinion that the defendant was overly dependent on his father. He also testified it was his belief the defendant understood right from wrong at the time of the torture-murder. Dr. Modlin further testified the defendant was capable of forming an intent at that time.

Dr. Cole also testified as an expert psychological witness for the defendant. It was his opinion the defendant was more adamant about his beliefs in December 1985 than he had been in October 1985. It was his opinion the defendant was suffering from shared paranoia. He believed the belief system espoused by the Rulo group was a systematized religious delusion. He believed the defendant was susceptible to such a delusion because of his youth and immaturity. It was his opinion the defendant's delusion was persecutorial. Dr. Cole also described the defendant as having formed a fairly normal relationship

with another member of the group. Dr. Cole testified the primary source of the delusion was Ryan, and also other people in the group. He defined the religious belief system as delusional because it defied credibility; therefore, an individual who believed in it would have had to have been suffering from a delusion.

Dr. Cole further testified that, in his opinion, the defendant's disorder was treatable, in part because of his youth, but for such treatment to work the defendant's father would have to cooperate and the defendant would have to establish attachments to people having different belief systems. Dr. Cole testified that such treatment would require several years, at minimum. Dr. Cole testified the defendant believed he was doing the right thing by participating in the torture-murder. He further testified it was his opinion that the defendant did, at that time, have the capacity to understand the nature and quality of his acts.

Dr. William Logan also testified on the defendant's behalf. He testified the defendant showed little emotion regarding James Thimm's death. The defendant had reported no difficulty in sleeping or nightmares as a result of his participation. Dr. Logan testified that when he asked the defendant what he would have done if Yahweh had prophesied or told the group the defendant should be tortured as was James Thimm, the defendant's response was "I'd either fight or run and get out of there."

It was Dr. Logan's opinion the defendant was suffering from a shared psychosis with his father. He believed the shared psychosis had developed because the father was suffering from delusions, and those delusions were transmitted to the defendant because his father was a very important person in the defendant's life. This was exacerbated because the family lived in a close-knit, isolated environment for a fairly extended period of time. Dr. Logan viewed the belief system of the group as delusional because it was so aberrant and unusual as compared to what an ordinary person would think. Dr. Logan also testified the defendant apparently was gratified by his acceptance as a man and enjoyed his rank on the farm.

It was his opinion that, at the time of the murder, the

defendant understood a man was being killed. He further testified that it was his opinion the defendant's ability to determine right and wrong at that time had been distorted by a major mental illness. It was his opinion the defendant could not have formed a willful and corrupt intention at that time. He also testified the defendant would have known his participation in the murder was wrong in the eyes of the law and that he could be punished for it.

The defendant testified at trial. He admitted he had not always been truthful with the psychiatrists, psychologists, and investigators that he had spoken with. He testified that he did not understand why James Thimm was supposed to be tortured.

When asked about the murder he gave the following version. He stated a shovel handle was inserted into the victim's rectum, and Michael Ryan, the defendant, Timothy Haverkamp, James Haverkamp, and David Andreas, respectively, each probed him. He then testified that when Michael Ryan left to find something bigger to use, Tim Haverkamp started probing again, and during that time something had broken inside of James Thimm. He testified his dad then inserted a second object which went in "real easy." He testified he and Tim then asked Yahweh "if James Thimm's bowels were busted," and Yahweh indicated they were. The defendant testified he had previously been told that James Thimm had been informed by Ryan that if he did not straighten up Yahweh would take his life. The defendant testified that during the probing he had gone to find some duct tape and that Ryan put the tape over James Thimm's mouth because the victim had groaned and asked Yahweh to forgive him. He testified that he had not felt sad for James Thimm because the victim had made Yahweh angry.

The defendant then testified that later that afternoon the five men went back to the farrowing house. James Thimm could then talk but could not walk very well. James Thimm was then laid on his belly and whipped 15 lashes by each of the five men. The defendant testified that, at that time, he was told James Thimm would probably die because his bowels had been "busted." The defendant testified he ate supper and slept that night without difficulty.

The next morning the men returned to the farrowing house. James Thimm was dragged from one side of the building to the other by wires around his wrists and was wired to an auger and whipped again. James Thimm was then wired to a pipe on the floor and whipped again. During this time he was undressed except for socks. The defendant testified that the victim first begged Yahweh for forgiveness and then began to lapse into unconsciousness after his fingers were shot. The defendant testified his arm was used by the men during the arm tests that day concerning shooting the victim's fingers and breaking his legs. The defendant testified that at some point during the whippings he had begun to call out the names of the other members of the group while lashing the victim. The defendant testified that after the whipping the five men ate lunch and that Ryan then told them Yahweh had said the victim was to be dead by 6 that night.

When the five returned to the farrowing house, each shot one of the victim's fingers on his left hand. The hand was propped up on a block of wood, palm up. He testified the victim was alive and conscious at that time. The victim was then whipped again, 15 more lashes apiece, twice by each of the five. The defendant then stated that some of the men discussed the possibility of skinning the victim, and the defendant went to get some razor blades. The defendant testified he believed the victim was dead at that time, but that he could not skin the leg very well because his hands kept sweating on the pliers and slipping off. The defendant testified that he and Tim then asked Yahweh if they could break the victim's legs, received an affirmative answer, and then each broke one leg. The defendant stated the body was then placed in a sleeping bag, a grave was dug, and the body was buried. He testified that later that night he, Tim and James Haverkamp, and David Andreas sat around, smoked marijuana, and laughed and talked about the murder. He further testified he had not had nightmares or trouble sleeping since the murder.

The defendant described Tim Haverkamp as a close friend and stated that he got along pretty well with Jim Haverkamp and David Andreas, but described his relationship with James Thimm as less close and that he ultimately disliked Thimm by

February of 1985. The defendant stated he had occasionally verbally abused Thimm. The defendant testified that he once accidentally shot Thimm, when Yahweh had pulled the trigger of his gun, causing a bullet to shoot James Thimm in the cheek. The following day, the defendant testified, he had put a notch on his gun to show that Yahweh had shot someone with it. The defendant also testified that once when Ryan had been gone, in March of 1985, he "grabbed my .45 and shoved it in his [Rick Stice's] face."

The defendant also testified that after the murder he had discussed the option of burning the body to destroy the evidence and had been told to get rid of the shovels, but did not do so even though Yahweh had told them to. The defendant testified, on cross-examination, that he enjoyed life on the farm and was not forced or coerced into participating in Thimm's torture and murder. He also testified he had been aware that Thimm was in pain while being probed.

The defendant testified he began to smoke marijuana late in the summer of 1984. He also testified that once, when Ryan was not on the farm, he, James Haverkamp, and Daniel Haverkamp went to Falls City and drove around drinking beer. When asked if he had ever worn a bulletproof vest and let people shoot at him, the defendant replied, "I wouldn't let it happen to me."

Ryan testified that it was his understanding the defendant had knocked Rick Stice into the front window of the trailer and broken it during Ryan's absence from the farm. He further testified it was the defendant's idea to say the names of the women and children while whipping Thimm.

Tim Haverkamp testified for the State. He testified the defendant was in charge of guard duty on the farm and that after the first of January 1985, the defendant was second in command. He testified that in March 1985 Ryan was gone for 2 1/2 days and the defendant and Tim were left in charge. He testified that during that time the two men had ordered Rick Stice and James Thimm to do extra work around the farm for punishment, including nonstop calisthenics and exercises. He testified that in the evening of the second day of Michael Ryan's absence from the farm, Richard Stice left.

Tim Haverkamp also testified regarding the defendant's shooting of Thimm's cheek. It was his recollection that prior to the incident the defendant had been talking to Thimm, became angered, and said something like, "Well, maybe I ought to just shoot you," and he then turned toward Thimm, aimed, and the gun went off. He also testified the defendant had put a notch on his gun and said it was to show he had shot one person.

Tim Haverkamp's version of the torture was similar to the defendant's in many respects, but differed in others. He testified Thimm was probed with two different shovel handles. Tim Haverkamp further testified Thimm was alive when he, Ryan, and possibly the defendant attempted to skin his leg. Tim Haverkamp testified it was the defendant who asked Ryan to ask Yahweh if he could break one of Thimm's legs and that he and the defendant then each broke one leg. Tim Haverkamp testified that, at this point, Thimm was still alive. He testified that Ryan then kicked Thimm a few times in the head and chest. Tim Haverkamp testified that after being kicked, Thimm was dead. Tim testified that he, Andreas, and the defendant dug the grave. He testified that Ryan placed the body in the grave and that Tim Haverkamp then shot Thimm once in the head, and later Thimm's remaining clothing was burned so that no evidence of Thimm's presence was left on the farm.

On cross-examination Tim Haverkamp testified that Ryan was proud of the defendant and had said the defendant would be his successor. He testified that he had stopped believing in Yahweh several weeks after his arrest and incarceration had separated him from the farm.

James Haverkamp also testified on behalf of the State. He testified that in August 1984 Ryan had announced that Yahweh had confirmed that the defendant was to be considered a man. He stated the defendant had seemed proud of his new status. He testified that at some point in time Rick Stice and James Thimm were demoted to slaves and that during Ryan's absence from the farm, the two "slaves" were ordered to do extra work, were not allowed to sleep, and were made to do calisthenics by the defendant and Tim Haverkamp. He further testified that during this time the defendant verbally abused both of the men and physically abused James Thimm.

He also testified that he saw Thimm's body lying on the floor in the confinement building, legs broken, after one leg had been skinned and that Thimm was then still alive. James testified Thimm was then stomped to death. After they were sure he was dead, James, the defendant, and Tim placed Thimm's body into the sleeping bag. James Haverkamp testified that he was not involved with the burial and that at the time of the murder he believed he was doing the right thing because he believed Yahweh's laws were supreme to all other laws.

David Andreas also testified on behalf of the State. His testimony closely matched James Haverkamp's, and differed from the defendant's testimony in several areas. He testified that when he first moved to the farm he and the defendant shared most of the guard duty, but the defendant's rank was always higher than his own. Andreas testified the defendant was subsequently in charge of Thimm, James Haverkamp, and Andreas; was generally above rank to Tim Haverkamp; relayed messages from his father; performed some guard duty; and was ultimately designated as the high prince in the fall of 1984.

Andreas testified that Stice and Thimm were demoted to slaves in approximately January of 1985. Andreas testified that when Ryan left the farm in March 1985, the defendant was in charge, physically abused Thimm by shoving him into and breaking a window above the sink in the south trailer house, and physically abused Rick Stice. He also testified the defendant forced the two men to stay awake, do calisthenics, and move hay bales from one side of a barn to the other and then back again. Andreas testified the defendant also ordered Thimm to stand up all night on guard as punishment.

Andreas testified Thimm was alive when his fingers were shot. He further stated he had later spoken with the defendant concerning the murder. It was his recollection the defendant thought it was "pretty neat" that someone who was 15 had killed a man. Andreas portrayed the defendant as a loud, obnoxious, boss' son.

Richard Stice testified on the defendant's behalf. Stice corroborated Haverkamp's and Andreas' testimony concerning the defendant's treatment of "the slaves" during Mike Ryan's absence. Stice also testified that during that time

the defendant ordered them to beat their heads against the wall and Stice had refused to do so. James Thimm, however, did follow the orders. It was at that point the defendant pulled a gun, put it against Stice's head, and told him he would blow Stice's head off if Stice refused. He further testified the defendant physically abused both of them by shoving them to the floor. Stice also testified the defendant was involved in the theft of some hogs. Stice testified it was his understanding Thimm was demoted to slave status because he and the defendant could not get along.

Stice testified he was present when the defendant shot Thimm in the cheek. Stice testified the defendant had been verbally abusing Thimm while the defendant was shooting out of the trailer window, turned toward Thimm, said, "I ought to shoot you," pulled the trigger, and shot him. Stice testified he saw the defendant pull the trigger. Stice also testified it was the defendant who suggested that Stice would be made to have sex with a goat unless he followed orders. Stice testified the defendant made hateful remarks to him when Ryan was not around, and would verbally abuse Thimm. It was Stice's opinion the defendant was not dependent on his father to make decisions, and exercised authority on his own.

Ruth Ryan testified on behalf of the defendant. She testified that she had seen the defendant snicker about what had happened to Thimm. Mrs. Ryan also testified that she believed the defendant felt he could communicate with Yahweh through his mind and that she knew the defendant and Tim Haverkamp had been put in charge of the men while Ryan was away from the farm.

Cheryl Gibson testified on behalf of the State. She testified the defendant was rather shook up when he told her Thimm had been shot in the cheek. Ryan had told her the defendant was eager to participate and learn how to torture and abuse a person. The defendant had appeared happy about how things had gone the day of the murder, and both defendant and Ryan had laughed and joked about Thimm's death. Gibson testified that the defendant was in charge of the men when his father left the farm, and she had heard Ryan tell Tim and the defendant they were in charge and to treat Stice and Thimm decently while

he was gone. When Ryan returned and learned how the men had been treated, he told the defendant, "I told you not to do that, but Yahweh is not mad at you, so that's okay."

John Dietrich, a criminologist for the Nebraska State Patrol, testified two shovels had been found which had greasy debris on the ends. Betty Jane Khreiss, a forensic serologist for the Nebraska State Patrol, testified she compared the hairs taken from the shovels with a sample taken from James Thimm and concluded they matched.

Jerry D. Rader testified he had been incarcerated for a time with Ryan, who told him that in the event he could not "carry out his role as the leader, his son was fully capable of following in his footsteps and would do so." He further testified Ryan had told him the defendant was his "right-hand man."

At sentencing the trial court stated that in sentencing the defendant the gravity of the offense could not be overlooked. The court stated that "[h]aving regard for the nature and the circumstance of this crime, and the history, character, and condition of this defendant, the Court finds that imprisonment of the defendant is necessary for the protection of the public for the following reasons." These reasons included that there was a risk the defendant would engage in future misconduct, that a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law, that the defendant required correctional treatment which could most effectively be provided by commitment, and that the court had considered and weighed the various grounds set forth in Neb. Rev. Stat. § 29-2260 (Reissue 1985) and had found no justification for withholding sentence or granting probation.

The evidence presented illustrated the defendant's participation in the daily life on the farm, his independent abuse of the victim prior to the murder, and his willing and enthusiastic participation in the murder. The defendant understood the nature of his participation in the murder. Further, all of the expert witnesses agreed the defendant's rehabilitation would require some length of time and was somewhat dependent upon support from Ryan. The trial court considered all of the relevant facts of the case before imposing sentence on the defendant. We find there was no abuse of

discretion in imposing the maximum sentence permitted by statute.

The judgment is affirmed.

AFFIRMED.

IN RE CLAIM OF REHM AND FAESSER FOR ATTORNEY FEES AND EXPENSES.
RODNEY J. REHM AND VICTOR FAESSER, APPELLANTS, V. COUNTY OF RICHARDSON, NEBRASKA, APPELLEE.

410 N.W.2d 92

Filed July 24, 1987. No. 86-477A.

1. **Criminal Law: Appeal and Error.** As a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment.
2. **Criminal Law: Attorney Fees: Counties.** Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
3. **Criminal Law: Attorney Fees: Counties: Appeal and Error.** The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
4. _____: _____: _____: _____. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
5. **Case Disapproved.** *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), is expressly disapproved.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Remanded with directions.

Earl J. Witthoff of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and William D. Sutter, for appellants, and Rodney J. Rehm and Victor Faesser, pro se.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

Peter Cohen for amicus curiae National Legal Aid & Defender Association.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant in *State v. Ryan, ante* p. 59, 409 N.W.2d 579 (1987), was represented in the lower court by appointed counsel, Rodney J. Rehm and Victor Faesser.

Both attorneys were appointed by the county court, and their appointments were continued by the district court at the arraignment hearing held on October 8, 1985. Faesser's appointment was subsequently continued for the appeal to this court.

Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment . . . . The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

Rehm filed applications requesting compensation for 663.25 hours. Faesser filed applications requesting compensation for 488.9 hours.

A hearing on the matter of attorney fees was held May 30, 1986. Several lawyers called as expert witnesses by Rehm and Faesser testified that, in their opinion, the number of hours spent by both attorneys in preparing for and trying the case was reasonable. Kirk Naylor testified he was currently serving as a court-appointed attorney and was being compensated at $50 per hour, which included both travel time and in-court time. Dennis Keefe, the public defender of Lancaster County, Nebraska, testified it was the policy in his office to assign two attorneys to capital cases. Richard Goos, the deputy public defender of Lancaster County and counsel for Michael Ryan,

testified he had worked closely with both defense attorneys during trial and believed no unnecessary services had been performed, and that the number of hours spent by Rehm was approximately equal to the number of hours spent by the witness. The court had "stipulated" that $50 an hour was a reasonable fee and conceded that Rehm is a well-qualified attorney.

During the trial Rehm resided in Lincoln, while Faesser resided in Pawnee City. The trial lasted 6 weeks.

After hearing the evidence, the trial court reviewed the progression hearings and the various orders which had been entered concerning the defendant's representation. The court stated that, in its view, the case was not unnecessarily complicated, although it was unusual; that at the start of the trial the attorneys had been told to be efficient in their representation due to the sparse population and tax base of the county; and that no double billing would be allowed unless good cause was shown. The court also stated it had asked the attorneys to divide work among those having a common interest and had informed them that both cocounsel should not be present at depositions and read all reports because that would be duplicative. The court also noted it had asked the attorneys to tape-record depositions rather than hire an expensive reporter and that, although the attorneys early on stated few depositions would be taken, costs exceeding $7,000 for depositions had been incurred.

The trial court then analyzed the hours of work presented by the attorneys. The court took exception to the hours claimed for travel time and for double billing. The court specifically disallowed the hours billed for the presence of both attorneys at the depositions of Rick Stice, David Andreas, and James Haverkamp; and for the depositions of Maxine, Lisa, and Norbert Haverkamp. The court stated that only one attorney should have been present at the depositions of Stice, Andreas, and James Haverkamp, and therefore allowed compensation for those depositions only on that basis. The court stated the depositions of the three other Haverkamps were either unnecessary or that a simple statement would have sufficed. The court then apparently disallowed all or a portion of the

total of 27 hours billed for the Haverkamp depositions.

The court also took exception to the hours incurred when Rehm traveled to Omaha, picked up Dr. Temerlin, drove to Falls City and met with Faesser, took Dr. Temerlin to interview the defendant, and later took the doctor back to Omaha and returned to Lincoln. Rehm billed 11 hours for that day, and Faesser 4 hours. The court stated a less expensive arrangement could have been made, and apparently reduced the attorney fees by some percentage of those hours. The court also took exception to 26 hours, 12.36 of them incurred for driving, billed when Rehm traveled to Kansas to visit the defendant's relatives. The court stated that, again, a less expensive arrangement could have been made. The court took exception as well to Rehm's traveling to Omaha prior to the trial to check on the jury selection process, a trip which required a total of 25 hours. The court further noted that 21 depositions were taken and that daily copy was ordered by the attorneys at a cost of $3,055. The court was concerned that the inefficient taking of depositions created a rippling effect in the number of hours billed by the expert witnesses.

The court then stated it had reviewed the awards of fees in several other criminal cases, including a first degree murder case in Otoe County. The fees in those cases, the number of hours spent, and the length of the trials were compared to the instant case.

Based upon the evidence, the record in the case, and the comparisons with other cases, the trial court concluded a reasonable fee for Rehm for the entire case was $20,874 and, for Faesser, $8,776. Of those amounts Rehm had previously received $3,042.75 and Faesser $3,389.23. The court concluded the combined award of $29,650 was in line with awards in the cases researched.

Both Rehm and Faesser have appealed.

There appears to be some confusion in our cases as to the right of a defense attorney to appeal from an award of fees as part of the defendant's appeal in a criminal case.

The State contends the attorneys have no right to appeal the award of attorney fees as a part of the defendant's appeal. In support of this contention the State cites *State v. Berry*, 192

Neb. 826, 224 N.W.2d 767 (1975).

In the *Berry* case, we held that a county board did not have standing to appeal an award of fees in a criminal case in which the county was not a party, and cited *State v. Schmidt*, 259 Iowa 972, 145 N.W.2d 631 (1966). In *Schmidt*, the Iowa Supreme Court held that neither the county ordered to pay the fees nor the defendant's attorney had the right to appeal an award of fees as part of the defendant's appeal. Our holding was limited, however, to the right of the county to appeal; the issue of the attorney's right to appeal was not addressed or decided. Moreover, in Iowa, the proper recourse available to attorneys dissatisfied with an award of fees is by petition for an original writ of certiorari to the Iowa Supreme Court. *State v. Iowa Dist. Court of Sioux County*, 286 N.W.2d 22 (Iowa 1979).

In *State v. Berry*, we stated that, as a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment. We further stated that only a person convicted of an offense has the right to appeal in a criminal matter, except that the county attorney has certain limited rights of appeal. Additionally, we stated at 828, 224 N.W.2d at 768:

> There is no statutory authority contained therein for an appeal by a county from an order of the court in connection with a criminal case awarding attorney's fees to an attorney for an indigent defendant, even though a statute of this state requires the county to pay such fees. The proper way to raise such an issue on appeal would be as was done by appellant in . . . Kovarik v. County of Banner . . . .

In *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975), an attorney was awarded fees by the district court and filed a claim in that amount with the county board. The claim was disallowed, and the attorney appealed to the district court, which entered a judgment in favor of the attorney. The county appealed to this court, and the judgment of the district court was affirmed.

In *State v. Berry, supra*, we also stated that, in our view, § 29-1804.12 requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which

the county is obligated to pay, but that the statute does not empower the district court to enter a formal judgment against the county. We stated such a conclusion was inescapable because the county was not a party to the criminal action; therefore, the court could not enter a legal judgment against the county.

The *Berry* case is consistent with several early opinions concerning the issue of compensation for attorneys who had defended indigent defendants. In *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), two attorneys appointed to represent an indigent in a capital case appealed from the county board's reduction of the fees awarded by the district court. The appeal was separate from the appeal by the defendant and was taken directly from the action of the county board. Moreover, in *County of Boone v. Armstrong, supra*, this court held that a finding by a district court regarding fees was not conclusive, but only prima facie, evidence of the correctness of the amount.

In *Edmonds v. State*, 43 Neb. 742, 62 N.W. 199 (1895), this court held that bills for attorneys' services must be presented, initially, to the trial court which heard the case. In *Moran v. Otoe County*, 95 Neb. 658, 146 N.W. 956 (1914), a separate appeal from a decision rendered by a district court regarding fees was appealed to and affirmed by this court.

In several other cases prior to *State v. Berry, supra*, this court had reviewed awards of attorney fees as part of the defendant's appeal. In *State v. Belding*, 192 Neb. 555, 222 N.W.2d 835 (1974), a court-appointed attorney for Belding, a minor, appealed from an award of attorney fees set by the district court. This court increased the award of attorney fees and affirmed the judgment in all other respects. Similarly, in *State v. McDonald*, 187 Neb. 752, 194 N.W.2d 183 (1972), this court reviewed an award of attorney fees as an issue in an appeal by the defendant. In that case the court found the award was insufficient and that the record was not sufficient to redetermine the appropriate amount, and remanded the cause.

The statute, § 29-1804.12, provides that the district court, "upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel

in the full amount determined by the court." We think the proper interpretation of this language is that the finding of the district court is binding upon both appointed counsel and the county unless an appeal is taken from that order. Although the county may not be a party to the proceeding in the usual sense, the county is represented by the county attorney, who can make whatever showing is necessary to ensure that the district court has the evidence necessary to make a proper finding. In *Kovarik v. County of Banner, supra* at 824, 224 N.W.2d at 766, we pointed out that although the prosecution is brought in the name of the State, "the actual prosecution of criminal charges has been delegated by the state to the counties." It is the county attorney who has the duty to prosecute criminal charges.

In quoting from *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966), we noted in *Kovarik* at 821, 224 N.W.2d at 764, " 'The county is a subdivision of the State, constituted to perform certain functions of State government, Bergen County v. Port of New York Authority, 32 N.J. 303, 312 (1960), and among them is the prosecution of criminal causes. . . .' " Criminal prosecution has always been regarded as being primarily a function of the counties.

Since the finding of the trial court is the basis for a claim to be presented to the county, both appointed counsel and the county must be afforded a right of review in this court in the event either is dissatisfied with the order of the district court.

The procedure described in *County of Boone v. Armstrong, supra*, is unsatisfactory for several reasons. The appeal to the district court from the action of the county upon the claim based on the allowance made by the county court gives appointed counsel no relief beyond restoring the claim to the amount originally fixed by the district court. In addition to being circuitous, it lacks due process.

We hold, therefore, that either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under § 29-1804.12. Such an appeal is a proceeding separate from the criminal case. It should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself. In the absence of an

appeal, the order of the district court is conclusive upon both appointed counsel and the county as to the amount allowed. *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), and all similar cases are expressly disapproved.

In regard to merits of the appeal, the record shows the trial court held progression hearings periodically before the trial began. After a progression hearing in October 1985, an order dated October 11, 1985, was issued, wherein the attorneys were ordered to "avoid double billing" and were requested to designate a "chief counsel" for their teams. In its progression order dated October 28, 1985, the court stated, "Court allows all co-counsel to be present for these three depositions, but only one attorney from each set of deposition counsel is to ask deposition questions," referring to the depositions of Stice, Andreas, and James Haverkamp. On November 12, 1985, the attorneys were allowed fees, at $50 per hour, plus expenses, for their hours to date. An order dated November 14 stated that Rehm was appointed chief counsel for the defendant. On December 18, 1985, the monthly payments were discontinued, and counsel were advised that fees would be determined at the close of the case.

At the pretrial conference, the issue of the jury selection process was raised, and Goos, one of Michael Ryan's attorneys, suggested he and Rehm should go to Omaha and oversee the process. The court stated, "All right, you guys go up there."

As we stated in *Jensen v. State*, 184 Neb. 802, 172 N.W.2d 607 (1969), an award of a reasonable attorney fee will not be reversed by this court in the absence of an abuse of discretion.

From our review of the record we conclude the trial court abused its discretion by refusing to compensate the attorneys for several services necessarily performed in the representation of the defendant. These include the time billed by both attorneys for the depositions of Stice, Andreas, and James Haverkamp, the time billed for the depositions of Lisa, Norbert, and Maxine Haverkamp, the time billed for taking an expert witness to interview the defendant, the time billed to travel to Kansas to interview the defendant's family, and the time billed by Rehm to travel to Omaha to check on the jury selection process.

The record shows the trial court specifically approved the presence of both attorneys at the depositions of Stice, Andreas, and James Haverkamp; therefore, the attorneys must be compensated for that service. A similar finding is supported by the record with regard to Rehm's trip to Omaha to check on the jury selection process.

As to the depositions taken of the Haverkamp family, the record supports a finding that the attorneys reasonably believed such depositions were necessary to prepare an adequate defense. The State had subpoenaed Norbert and Maxine Haverkamp to appear at the trial and did not release them from those subpoenas until after jury selection had begun. Further, several references to Lisa Haverkamp were made by each codefendant prior to trial, which may reasonably have led the defense attorneys to believe that her deposition was necessary to prepare an adequate defense. The depositions were clearly not unnecessary services, and compensation should have been awarded for the time spent in obtaining them.

The record supports similar findings with regard to the travel required to transport the expert witness to interview the defendant and for the trip made to interview the defendant's family. The attorneys were attempting to ensure that they had adequate information to competently represent their client, and their actions, although perhaps not optimally efficient when viewed in hindsight, were not unreasonable under the circumstances.

We decline, however, to increase the award by compensating the attorneys for the hours billed for traveling to and from court appearances in this case. The attorneys were compensated on a per diem basis for court appearances and for their mileage and hotel expenses incurred during their representation. We decline to apply the portal-to-portal doctrine in this case to the attorneys who were appointed to represent the defendant. Cf., *United States v. James*, 301 F. Supp. 107 (W. D. Tex. 1969); *State v. Kenney*, 24 Wis. 2d 172, 128 N.W.2d 450 (1964).

Unfortunately, the record is not sufficiently clear and does not disclose the necessary facts so that the amount by which the awards should be increased can be determined.

The cause is, therefore, remanded to the district court for further proceedings with directions to modify the award of fees in a manner consistent with this opinion.

REMANDED WITH DIRECTIONS.

IN RE INTEREST OF T.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. Q.M., APPELLANT.

409 N.W.2d 607

Filed July 24, 1987. No. 86-1002.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. _____. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Juvenile Courts.** As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
5. **Expert Witnesses: Appeal and Error.** Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

John G. Liakos of Liakos & Kuhn, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

A petition was filed on October 23, 1984, in the separate juvenile court of Douglas County, and contained allegations that T.C., born on August 15, 1984, was a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), because T.C. lacked proper parental care by reason of the fault or habits of his parents, namely:

> A. [T.C.'s parents] have failed to cooperate with medical personnel in accepting the needed training required for providing the necessary care required by said child, who was born prematurely and is a high risk baby, to wit:
>
> 1. Said child was on the apnea monitor from August 15, 1984 to October 2, 1984; [T.C.'s parents] were told of the need for CPR and monitor training before said child could be released; [T.C.'s parents] failed to appear and satisfactorily complete the training.
>
> B. Said child was in the hospital from August 15, 1984 to October 2, 1984, during which time [T.C.'s parents] visited said child five times in August and only once in September; [T.C.'s parents] had been advised of the importance of visiting and becoming familiar with said child.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987); *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. See, *In*

re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra.*

On November 5, 1984, the court placed temporary custody of T.C. with the Nebraska Department of Social Services until further order of the court and then held an adjudication hearing on January 30, 1985. T.C.'s mother was represented by counsel, and a guardian ad litem had been appointed for T.C.

At the adjudication hearing, a neonatologist testified that T.C. was born 8 to 10 weeks prematurely on August 15, 1984, and suffered from apnea, which is cessation of breathing accompanied by a decrease of the heart's rate, and had a hypothyroid condition. The neonatologist testified about the necessity of keeping T.C. on an apnea monitor after the child's release from the hospital. The apnea monitor sounds an alarm if the child's breathing stops. Therefore, in addition to the monitor, it is necessary for the child's survival that there be someone to administer cardiopulmonary resuscitation or the child will die within minutes.

The child's parents are not married to each other. The mother was informed about the serious consequences of her child's condition if prompt resuscitative action were not taken in response to the monitor's alarm. The mother was also informed that her child would be placed in foster care if the mother did not have suitable CPR training. Arrangements were made for the mother's CPR lessons at the hospital, but the mother did not attend those CPR classes. The mother told one of the hospital's staff that she was too busy to attend the classes and was thinking about changing doctors, since she did not want T.C. to come home from the hospital with an apnea monitor. The child was placed in foster care, pending the mother's CPR training.

The adjudication hearing was continued until April 1, 1985. When the adjudication hearing resumed, the mother had not completed CPR training. As an explanation for her failure to obtain CPR training, the mother testified that T.C.'s father had beaten her with a hammer in February 1985, breaking her ribs

and causing hospitalization for approximately 1 month. In the later stages of the mother's pregnancy with T.C., the child's father pulled the mother from an automobile and struck blows to the pregnant mother's stomach. T.C. is macrocephalic, a condition described as an abnormal rate of growth for the child's head as the result of excessive cranial fluid, which requires a permanent tap to drain the excess fluid from T.C.'s brain. T.C. is mentally handicapped and needs special attention and education, such as that available at the Meyer Children's Rehabilitation Institute.

The court found that T.C. was a juvenile within the meaning of § 43-247(3)(a) and ordered a dispositional hearing for May 13, 1985, at which the evidence established that T.C.'s mother, 31 years of age, was unemployed and had convictions for shoplifting, disorderly conduct, and prostitution. At the dispositional hearing, without objection, the court ordered

> [t]hat [T.C.'s mother] shall:
>
> a. Participate in a CPR and apnea monitor training program;
>
> b. Participate in the Early Referral Program through the Meyers Childrens [sic] Rehabilitation Institute;
>
> c. Participate in a domestic violence program;
>
> d. Maintain a stable legal income;
>
> e. Obtain and maintain suitable stable housing;
>
> f. Remain free from all state, municipal and federal criminal arrests;
>
> g. Have reasonable rights of visitation as arranged by the Child Protective Service worker;
>
> h. Cooperate with the workers on this case including notifying the Court within 48 hours of a change in residence or income.

At a review hearing on November 7, 1985, the court was informed about the necessity of CPR in relation to T.C.'s continuing condition, but T.C.'s mother had not completed CPR training. The court admonished T.C.'s mother concerning the necessity of the mother's completion of CPR classes. The court's previous order of May 13, 1985, remained in effect, without any complaint or suggestions by the mother, substantially unchanged except that T.C.'s mother was required

to participate in the Omaha Public Schools' Infant Stimulation Program instead of the program provided through the Meyer Children's Rehabilitation Institute.

Based on § 43-292(6) (Reissue 1984), a motion to terminate parental rights was filed on April 9, 1986, alleging that T.C.'s mother had failed to comply with the plan of rehabilitation ordered by the court on May 13, 1985, and its subsequent modifications, that is, T.C.'s mother had failed to complete a CPR training program; had not participated in the Infant Stimulation Program available through the Omaha public school system; had not participated in a domestic violence program; did not remain free from arrest; failed to maintain stable housing; and, from May 13 to November 6, 1985, had visited T.C. on only six occasions and had not visited T.C. since November 6, 1985.

At the hearing for termination of parental rights, on October 16, 1986, T.C.'s mother had completed neither the CPR training nor the Infant Stimulation Program required as the result of T.C.'s mental and physical condition. T.C.'s mother had told a social worker that the mother was too busy to attend the domestic violence program. When the social worker inquired about the mother's noncompliance with the specific rehabilitative program ordered by the court, the mother responded, "I'll get to it. I'll make an appointment. I'll go next week. I'll set it up." T.C.'s mother changed her residence, which was discovered by a probation officer only after additional investigation concerning the mother's whereabouts.

On account of his special needs, T.C. had been placed with the Nebraska Children's Home Society. During that time, T.C.'s mother was allowed weekly visits with T.C., including the time while T.C. was in a "Homebound Preschool Handicapped Program," when the mother could have observed a teacher working with T.C. in view of his special needs. Between June 3, 1985, and April 9, 1986, the child's mother visited him only twice and, before April 9, made no request to visit T.C. in 1986. The mother was never told that she could not visit the child. However, the mother visited T.C. on only six occasions in the 2-year span of foster care at Nebraska Children's Home Society. The mother was incarcerated in October 1985 for disorderly

conduct. After taking the case under advisement, the court, on October 30, 1986, made the following findings and order:

> That [T.C.] is within the meaning of . . . Section 43-292(6) . . . by clear and convincing evidence because reasonable efforts under the direction of the Court have failed to correct the conditions leading to the Court's previous finding that the child is within the meaning of Section 43-247(3a) . . . [and]
>
> . . . .
>
> . . . [t]hat the parental rights of [T.C.'s mother] . . . are hereby terminated . . . .

The court then placed T.C. in custody of the Nebraska Department of Social Services pending a further dispositional hearing. The mother has appealed and contends that the court should not have considered the mother's failure to remain free from arrest and her failure to participate in the programs regarding domestic violence and infant stimulation. Also, the mother contends that the court should not have considered the child's extended foster care as a factor affecting termination of parental rights and should not have considered certain testimony from a registered nurse, an expert witness, concerning programs for children with special needs as the result of their physical or mental condition. Finally, the mother contends that the evidence is not clear and convincing that she did not make reasonable efforts to correct the conditions leading to the adjudication that T.C. was a juvenile within the meaning of § 43-247(3)(a).

As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. See *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). Cf. § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication).

As expressed in *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984): "The mother has failed to rehabilitate herself, notwithstanding the [court's] order and programs directed to rehabilitation. When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child

require a final disposition be made without delay."

The program for the mother's rehabilitation was designed to supply proper parental care which was previously lacking and to attend to T.C.'s special needs. In view of the child's condition and special needs, T.C.'s best interests warranted some program such as that ordered by the juvenile court in this case. A court-ordered program, necessarily injected into the lives of T.C. and his mother, is a commentary in itself. The special needs of a child such as T.C., ordinarily, would have evoked a parent's spontaneous and voluntarily responsive attention, not parental procrastination approaching apathy. T.C.'s daily and immediate needs could not be deferred until his mother's inclination might prompt appropriate action. We find clear and convincing evidence that T.C.'s mother failed to comply with the rehabilitative program ordered by the juvenile court and that the mother has not corrected the conditions underlying the adjudication that T.C. was a juvenile within the Nebraska Juvenile Code. Therefore, termination of parental rights is permitted under § 43-292(6).

Finally, the mother contends that the court erred in admitting testimony of a registered nurse concerning programs for the special needs of T.C. As we stated in *State v. Copple*, 224 Neb. 672, 697, 401 N.W.2d 141, 158 (1987):

> Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion. See *Schmidt v. J.C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

We find no abuse of discretion by the trial court in admitting the nurse's testimony as evidence. Also, as previously noted, this court reviews the record de novo in resolving questions concerning termination of parental rights.

AFFIRMED.

RICHARD D. PARRIOTT ET AL., APPELLANTS, V. DRAINAGE DISTRICT NO. 6 OF PERU, NEBRASKA, AND BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLEES.

410 N.W.2d 97

Filed July 31, 1987. No. 85-859.

1. **Political Subdivisions Tort Claims Act: Words and Phrases.** A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
2. **Constitutional Law: Property: Damages.** When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Reversed and remanded for further proceedings.

John J. Higgins of Higgins, Okun & Calkins, and Dwight Griffiths, for appellants.

Albert G. Fuller and William C. Nelson of Fuller & Chatelain, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiffs, Richard D. Parriott, John J. Kozak, Sarah E. Kozak, and Mary Dunn, appeal from an order of the district court for Nemaha County sustaining the demurrer of defendant-appellee Drainage District No. 6 of Peru, Nebraska, to plaintiffs' petition. Plaintiffs allege the district court erred in sustaining the demurrer on the basis that plaintiffs failed to allege compliance with the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). For the reasons hereafter stated, the order of the district court is reversed and the cause remanded for further proceedings.

The record shows that plaintiffs are the present owners and tenant in possession of approximately 240 acres of land located in Nemaha County, Nebraska. On June 13, 1985, they filed a petition in the district court for Nemaha County seeking damages as a result of the defendants' alleged negligence in

failing to maintain a drainage ditch in proper repair, thereby resulting in the flooding of plaintiffs' land. The petition sought damages to plaintiffs' crops in the amount of $19,987.28. Defendant drainage district filed a demurrer to the petition on August 14, 1985, stating that the petition failed to state a cause of action in that it did not allege compliance with the Political Subdivisions Tort Claims Act. On September 18, 1985, the district court sustained the demurrer and gave the plaintiffs 10 days to amend their petition. Plaintiffs filed their amended petition on September 26, 1985, alleging that the defendant drainage district is a quasi corporation formed for the sole and exclusive benefit of the territory lying within the district for which it was formed and is not a governmental agency or unit of local government as contemplated by the Nebraska Political Subdivisions Tort Claims Act. Defendant drainage district demurred to the amended petition, again stating the petition did not state a cause of action in that it did not allege compliance with §§ 23-2401 et seq. The district court found that there was no allegation in the petition that plaintiffs had complied with the Political Subdivisions Tort Claims Act, sustained the demurrer, and dismissed the amended petition as to the defendant drainage district. Plaintiffs timely appealed to this court.

Plaintiffs in their first assignment of error contend that the trial court erred in holding that defendant drainage district is a political subdivision, thereby mandating compliance with the provisions of the Political Subdivisions Tort Claims Act before a suit can be instituted. Plaintiffs contend that a drainage district is not a political subdivision and therefore is not subject to the Political Subdivisions Tort Claims Act. We determine this contention is without merit.

While a drainage district has not been specifically listed as a political subdivision, as contemplated by the Political Subdivisions Tort Claims Act, this court has held that a corporation created for the purpose of conducting the affairs of a drainage district is a public corporation and a body politic, politically organized and engaged in the exercise of political functions. *Wellensiek v. Drainage Dist. No. 1*, 172 Neb. 869, 112 N.W.2d 267 (1961). We have defined a political subdivision

as a body which contemplates geographical area and boundaries, public elections, taxing power, and a general purpose or benefit. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979). A drainage district, as established by Neb. Rev. Stat. §§ 31-301 et seq. (Reissue 1984), contains each of these qualities of a political subdivision. Section 31-301 states that the drainage district may have articles of association in which the limits of the proposed district shall be stated. Sections 31-306 and 31-307 provide for the election of the first board of supervisors and for annual elections thereafter. The authority to levy taxes is found in §§ 31-330 and 31-333, which provide that "the board of supervisors . . . may at once levy tax on the lands and other property in the district" and shall "annually thereafter determine, order, and levy the amount of the installment of the tax hereinbefore named . . . ." Finally, § 31-321 gives to the drainage district the power of eminent domain, which, as stated in the Constitution, must be used for a public purpose and benefit. Therefore, for purposes of compliance with the Political Subdivisions Tort Claims Act in actions arising in tort law, we hold a drainage district to be a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, and, therefore, compliance with §§ 23-2401 et seq. is a condition precedent to the institution of a tort action against a drainage district. The failure to allege that the condition had been met is a fatal defect to such a suit. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986). Courts in other jurisdictions have also reached the conclusion that drainage districts are political subdivisions. See, *Kaw Drainage Dist. v. Attwood*, 229 Kan. 594, 629 P.2d 163 (1981); *Reed v. Muscatine—Louisa Drain. Dist. No. 13*, 263 N.W.2d 548 (Iowa 1978); *Stark v. Bailey Drainage Dist.*, 505 So. 2d 566 (Fla. App. 1987).

Plaintiffs' second assignment of error is that the trial court erred in sustaining defendant's demurrer and dismissing plaintiffs' amended petition as to the drainage district. While our holding that a drainage district is a political subdivision requires compliance with §§ 23-2401 et seq. prior to the institution of a tort action, the fact that the plaintiffs did not allege compliance in their amended petition is not fatal in the

case at bar. In Nebraska it is the rule that pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of a plaintiff, a demurrer thereto should be overruled. *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Under a code system of pleading, such as Nebraska's, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery. *Waite v. Samson Dev. Co., supra.*

In the case at bar, plaintiffs' petition alleges that due to the failure to maintain and repair defendant drainage district's ditch, plaintiffs' land was flooded, resulting in damages to crops in the amount of $19,987.28. A drainage district, such as defendant, has been shown to be a political subdivision which by virtue of § 31-321 holds the power of eminent domain to be used for public purpose and benefit. When private property has been damaged for public use, alleged as in the case at bar, the property owners are entitled to seek damages in a number of ways. The landowners could have sued in tort under the Political Subdivisions Tort Claims Act, or could have sought compensation for an action for inverse condemnation under Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1981 & 1986). *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977). Additionally, when private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21. *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). Merely because the landowners could have sued in tort under the Political Subdivisions Tort Claims Act does not preclude them from bringing a direct action for damages under Neb. Const. art. I, § 21.

Further, it is not necessary that Neb. Const. art. I, § 21, the specific provision of the Constitution relating to damage for a public use, be set out in the pleadings, or even its existence alleged. The pleading will be sufficient as against a general demurrer if it alleges facts which constitute a cause of action. *Kula v. Prososki, supra.* Neb. Const. art. I, § 21, is a self-executing provision which does not require legislative

action to make the remedy available. *Kula v. Prososki, supra; Wood v. Farwell Irr. Dist.*, 217 Neb. 511, 349 N.W.2d 633 (1984). In a suit to recover damages for a public use, if the fact is established that the property has in fact been damaged for a public use, the landowner is entitled to compensation. *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960). The amended petition in the case at bar sufficiently pled the facts establishing a cause of action for damage to the property for public use, which if proved entitled the plaintiffs to compensation under Neb. Const. art. I, § 21.

We hold that the trial court improperly sustained defendant's demurrer to plaintiffs' amended petition and erred in dismissing the petition as to the drainage district. Therefore, the order of the district court for Nemaha County is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WASHINGTON HEIGHTS CO., A NEBRASKA CORPORATION, APPELLEE, V. JAMES R. FRAZIER, APPELLANT.

409 N.W.2d 612

Filed July 31, 1987. No. 85-887.

1. **Breach of Contract.** A suit for the claimed breach of a contract presents an action at law.
2. **Appeal and Error.** The findings and conclusions of the trial court in an action at law tried without a jury will not be set aside unless they are clearly wrong.
3. _____. In an action at law tried without a jury, it is not the province of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, the court presumes that the trial court resolved any controverted facts in favor of the successful party, and considers the evidence and all permissible inferences therefrom most favorably to that party.
4. **Contracts.** The meaning of an unambiguous contract presents a question of law.
5. **Appeal and Error.** The Nebraska Supreme Court has an obligation to reach independent conclusions on questions of law.
6. **Contracts: Intent.** If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.

7. **Contracts: Parol Evidence.** Parol evidence is admissible to explain vague language contained in a written contract.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Culhane of Erickson & Sederstrom, P.C., for appellant.

Keith I. Frederick of Schmid, Ford, Mooney & Frederick, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On September 23, 1983, plaintiff-appellee, Washington Heights Co., a Nebraska corporation, entered into an agreement to purchase the shares of its capital stock then owned by defendant-appellant, James R. Frazier. At about the same time, Richard Schurkamp agreed to purchase Frazier's interest in Grover Square, Ltd., a partnership. Each agreement required the purchaser to pay Frazier a base price which was subject to being increased, but not decreased, by one-third of any "net cash flow" produced by a particular Washington Heights Co. operation and by Grover Square, Ltd., to January 30, 1984, the closing date of the transactions. As a part of the closing, Washington Heights Co. paid $25,000 and Grover Square, Ltd., $1,000 to Frazier as advance distributions of the anticipated net cash-flows. After the closing, Washington Heights Co. concluded that its relevant operation resulted in a cash-flow deficit. Grover Square, Ltd., also concluded its operations resulted in a cash-flow deficit. Each then demanded return of the advance distribution it had made. Upon Frazier's failure to return the distributions, Schurkamp assigned any cause of action he might have to Washington Heights Co., which instituted this suit, seeking $25,000 on its first cause of action for the advance distribution it had made and $1,000 on its second cause of action for the advance distribution Schurkamp had made on behalf of Grover Square, Ltd. Frazier denied Washington Heights Co.'s claims and filed a

counterclaim, alleging that he was entitled to more money than he had received as the result of the net cash-flow produced by the relevant Washington Heights Co. operation. After a bench trial, the court entered judgments dismissing Frazier's counterclaim and awarding Washington Heights Co. the sums it had sought. Frazier appeals to this court only the judgments entered in favor of Washington Heights Co., and claims, in summary, that the trial court erred in (1) treating certain expenditures for capital improvements as ordinary expenses, (2) determining the amounts of certain other expenditures, and (3) failing to properly apportion the latter expenses between Washington Heights Co. and Frazier. We affirm in part and in part reverse and remand with directions.

The causes alleged seek damages for the claimed breach of contracts and, as such, present actions at law. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985). Accordingly, our scope of review is limited to determining whether the judgments entered below are clearly wrong, for the findings and conclusions of the trial court in actions at law tried without a jury have the effect of jury verdicts and will not be set aside unless they are such. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985). Moreover, in such a circumstance, it is not within our province to resolve conflicts in or reweigh the evidence; rather, we presume that the trial court resolved any controverted facts in favor of the successful party, and we consider the evidence and all permissible inferences therefrom most favorably to that party. *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982).

The uncontradicted evidence establishes that over the years, Schurkamp, Frazier, and another shared ownership interests in a number of business operations. At the relevant time, each of these men owned, among other things, an equal share in Washington Heights Co., Grover Square, Ltd., and Frazier-Schurkamp, Inc., a corporation. Washington Heights Co. owned interests in and operated apartments, its principal asset being a 70-percent ownership interest as a joint venturer with Ohio National Life Insurance Company in a complex

called the Washington Heights Apartments. Grover Square, Ltd., also owned and operated an apartment complex. Frazier-Schurkamp, Inc., owned and operated a mechanical contracting business. As the consequence of a long-deteriorated relationship between Schurkamp and Frazier, and of Frazier's desire to withdraw from the business, it was decided that the interests would be divided such that Schurkamp would become the sole owner of the businesses for which he had been the principal manager, Washington Heights Co. and Grover Square, Ltd.; the third man would become sole owner of the business for which he had been the principal manager, Frazier-Schurkamp, Inc.; and Frazier would receive payment for his interests. It is in the context of that background that the contracts at issue in this litigation came into existence.

We note that although the pleadings raise an issue as to the existence and amount of the net cash-flow generated by Grover Square, Ltd., Frazier's attack focuses on the existence and amount of the net cash-flow generated by Washington Heights Co.'s operation of its joint venture with Ohio National Life Insurance Company. As a consequence, the record presents no evidence which permits us to disturb the $1,000 awarded to Washington Heights Co. on its second cause of action. Accordingly, we affirm the trial court's judgment on Washington Heights Co.'s second cause of action and proceed to review the judgment which awarded Washington Heights Co. $25,000 on its first cause of action.

The relevant Washington Heights Co. contract defined "Net Cash Flow" as being

> seventy percent (70%) of the excess of cash receipts over cash expenditures from the operation of Washington Heights Apartments in Omaha, Nebraska for any fiscal year or partial fiscal year from March 1, 1983 to the date of Closing, as determined in accordance with generally accepted accounting principles, except that depreciation of buildings, improvements, and personalty, and loan fees or expenses of refinancing contemplated by this Agreement, shall not be considered as a deduction from cash receipts (or included as cash expenditures) and real estate taxes, insurance premiums, and other items

> normally accrued or adjusted through pro-rations to reflect less than a full year of operations shall be pro-rated for the period involved.

Except for the proration language, the foregoing definition of "Net Cash Flow" parallels that used in the joint venture agreement between Washington Heights Co. and Ohio National Life Insurance Company. The contract documents related to this aspect of the transactions provided that the net cash-flow was to be determined by Washington Heights Co.'s accountants and that after such audit was completed, adjustments would be made to reconcile any differences. Frazier reserved the right to conduct an independent audit.

A member of the certified public accountancy firm which had always performed the accounting services required by Washington Heights Co.'s joint venture agreement with Ohio National Life Insurance Company, and did similar work for the parties' other businesses as well, concluded, through the exercise of his own independent judgment, that the operation of the complex known as Washington Heights Apartments during the relevant period resulted in a cash-flow deficit of $51,836. As might be expected, Frazier does not agree, and on this point the evidence is in conflict.

While Frazier did not cause an independent audit to be made, he did dispraise the Washington Heights Co. audit through the testimony of an assistant professor of accountancy from a local university. In the professor's opinion, the operation in question resulted in a total cash-flow during the relevant period of $242,638, leaving $169,847, 70 percent of the total, for distribution as the net cash-flow in accordance with the terms of the agreement. According to him, the difference stems from Washington Heights Co.'s mistreatment of expenditures for capital improvements, as claimed in Frazier's first assignment of error; Washington Heights Co.'s inappropriate calculation of certain other expenditures, as claimed in Frazier's second assignment of error; and Washington Heights Co.'s failure to properly apportion the latter expenses, as claimed in Frazier's third assignment of error.

As to the first matter, the professor, in effect, testified that $172,736 of the expenses for certain replacements, repairs, and

refurbishments of the buildings constituting the Washington Heights Apartments should have been treated as additions to capital rather than as ordinary expenses. In partial support of that position, the professor points to the fact that while only $203,987 was budgeted for such work during the relevant fiscal year, $304,509 was expended. That additional sum of approximately $100,000 is 49 percent greater than the amount budgeted. Moreover, the expenditures exceeded the prior year's like expenditures by approximately $140,000. However, the professor admitted that there were several ways in which to determine whether an item should be treated as an addition to capital or as an item of ordinary expense and that there are bases for a difference of opinion in that regard. He further admitted that if he were doing an audit, he would have considered it important to determine that he was aware of all the facts by consulting with Washington Heights Co.'s accountant; however, as he was not doing an audit, he did not take that step. Moreover, he conceded that the consistency principle of accounting holds that financial statements should be prepared in a manner consistent with those prepared for prior like periods.

Washington Heights Co. adduced evidence that the questioned expenses had always been treated in the past as they were on the present occasion and that Frazier and the other owner were aware of the expenditures being made. In fact, there was general agreement among the owners that it was important to keep up the appearance of the complex during the period of negotiations so as to keep it marketable. Further, while it is true the questioned expenses exceed the amount budgeted, such also occurred during the 1982-83 fiscal year, when the budget called for an expenditure of $117,000 but an additional $76,536, approximately 65 percent more, was actually expended, for a total of $193,536.

Given that state of the record, it cannot be said the trial court was clearly wrong in concluding the evidence supported the treatment Washington Heights Co. gave the questioned expenditures. There is therefore no merit to Frazier's first assignment of error.

In connection with the second assignment of error, Frazier

claims that in computing the net cash-flow Washington Heights Co. deducted certain expenses twice. The professor testifying on Frazier's behalf said he thought "the real estate taxes payable, the interest payable, the accrued items [were] double-counted." That witness did not, however, explain how he reached that conclusion.

On the other hand, Washington Heights Co.'s accountant explained that as the books had been kept on an accrual basis, a series of conversions had to be made to reflect the corporation's actual cash-flow, for in the accrual method of accounting one is not concerned with when an item of expense is actually paid. He testified that he made the conversions required to reflect the actual cash payments made during the year, and deducted nothing twice. Moreover, the professor conceded that the method used by Washington Heights Co. was "one approach that could be taken to calculat[e] cash flow."

Again, under that state of the record it cannot be said the trial court was clearly wrong in concluding that the evidence supported Washington Heights Co.'s accounting in that regard. There is therefore no merit to the second assignment of error.

In arguing his third assignment of error Frazier urges that Washington Heights Co. failed to prorate the real estate taxes, insurance premiums, interest, and other accrued expenses to reflect that he had an interest for only 11 months of the fiscal year which began on March 1, 1983, and ended February 29, 1984.

Resolution of this aspect of the case depends upon the meaning of the phrase "real estate taxes, insurance premiums, and other items normally accrued or adjusted through pro-rations to reflect less than a full year of operations shall be pro-rated for the period involved," as used in the contract definition of "Net Cash Flow." The meaning of an unambiguous contract presents a question of law. See *Martin v. Reavis*, 117 Neb. 219, 220 N.W. 238 (1928). This court has an obligation to reach independent conclusions on questions of law. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). It is also the rule that if a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties

must be determined from the contents of the contract document. *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980).

The unambiguous meaning of the phrase in question is that, as only 11 months of the fiscal year had passed at the time of closing, only eleven-twelfths of certain designated expenses were to be charged against that period's income. The agreement was obviously so structured in order that Frazier not be made to pay expenses attributable to a period of time during which he had no ownership interest. It is equally clear the phrase applies to real estate taxes and insurance premiums because it says so in exactly those words.

What is not clear is what the parties intended as being within the ambit of the words "and other items normally accrued or adjusted through pro-rations." The applicable rule in such a situation is that parol evidence is admissible to explain vague language contained in a written contract. See, *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980); *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

The intent of the parties in that regard is evidenced by Schurkamp's testimony of his understanding that only eleven-twelfths of the interest and taxes were to be charged against the cash-flow. Thus, only eleven-twelfths of the real estate taxes, insurance premiums, and interest should have been deducted. Washington Heights Co.'s accountant testified, however, that he deducted the amount of interest, taxes, and expenses which had accrued and were owing as of January 30, 1984, notwithstanding the fact such may have been attributable to the entire year. Thus, Washington Heights Co. did not prorate the real estate taxes, insurance premiums, and interest as the contract required, and to that extent Washington Heights Co.'s accounting violates the terms of the agreement. So far as the record reflects, neither did the professor testifying for Frazier make any prorations in computing his version of the net cash-flow.

Thus, Frazier's third assignment of error is meritorious; the evidence fails to support the judgment which awarded Washington Heights Co. $25,000 on its first cause of action.

Accordingly, that judgment is reversed and set aside and the

cause remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

PLATTE VALLEY FEDERAL SAVINGS & LOAN ASSOCIATION, APPELLEE, V. MARJORIE L. GRAY ET AL., APPELLANTS.

409 N.W.2d 617

Filed July 31, 1987. No. 85-918.

1. **Foreclosure: Rescission: Appeal and Error.** In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Fraud: Proof.** The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
3. **Fraud: Negligence.** The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
4. **Rescission: Proof: Fraud: Damages.** Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

George A. Sommer, for appellant Gray.

Robert J. Bulger of Bulger & Jensen, for appellant Goltl.

Christine J. Law of Atkins Ferguson Zimmerman Carney Law, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Defendants appeal from an order granting plaintiff's requested decree of foreclosure on certain residential real property and denying defendants' counterclaim for rescission.

On May 7, 1982, Marvin E. Ziegler and Carol A. Ziegler executed a note to plaintiff for $66,000, secured by a mortgage on certain residential real property. On June 25, 1982, defendant Marjorie L. Gray contracted to buy that property from the Zieglers, subject to the mortgage to plaintiff. Then, on June 30, 1982, plaintiff issued a mortgage loan commitment to Gray and August P. Goltl. This commitment had a notation as follows: "( ) Flood Insurance Mandatory, see reverse." The notation on the reverse of the form read as follows:

> FLOOD INSURANCE
>
> If the "Flood Insurance Mandatory" box was checked, this property has been determined to be in an area which has a special flood hazard. Federal law requires that flood insurance, available through any agent, be written in either the maximum amount available or the loan balance, whichever is the lesser. This insurance will be mandatory until this loan is paid in full. By signing and accepting this commitment you acknowledge that the property securing this loan is in an area identified as having a special flood hazard and agree to these insurance requirements.

The blank opposite the "Flood Insurance Mandatory" condition was not checked. This loan commitment was signed by Gray and Goltl on July 2, 1982. Thereafter, on July 15, 1982, an assumption agreement was executed by the Zieglers, Gray and Goltl, and plaintiff by its agent, Russell A. Godberson. Defendants learned that the property was in a flood plain on July 11, 1983.

In March of 1984, defendants ceased paying the mortgage payments. Plaintiff then brought this foreclosure action against Gray and Adrian P. Goltl, the personal representative of the now-deceased August Goltl. Defendant Gray answered and counterclaimed for rescission of the assumption agreement,

based on plaintiff's alleged misrepresentation that the property in question was not located in a flood plain. Defendant Goltl's second amended answer also counterclaimed for rescission.

The case went to trial on September 10 and 11, 1985. The court granted plaintiff's requested foreclosure and denied defendants' claim for rescission. Defendants have appealed.

Two of defendants' assignments of error can be combined into one—that being that the trial court erred in finding that defendants were not entitled to rescission of the assignment of mortgage and note based on plaintiff's alleged misrepresentation. Defendants also contend that the trial court erred in denying rescission of the assumption agreement on the basis of delay by defendants in exercising their right of rescission. Finally, defendants contend that the court erred in not granting defendants leave to amend their pleadings to allege damages. We affirm.

This case is a foreclosure action with a counterclaim for rescission, both of which are equitable in nature. Therefore, we will review the record de novo, which means we will reach an independent conclusion without reference to the findings of the trial court. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985); *First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co.*, 219 Neb. 887, 367 N.W.2d 136 (1985). However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.

Although the briefs were written as if this were a false representation case, during oral argument counsel for both parties agreed that this case is really one of fraudulent concealment. Thus, we will analyze it using the factors set forth in *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

In *Nelson* we set forth the elements which a party suing for damages based on fraudulent concealment must allege and prove by a preponderance of the evidence:

> (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or

> concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Id. at 762, 401 N.W.2d at 476-77. A party seeking rescission on the ground of fraudulent concealment must also allege and prove the same elements. In this case, however, defendants failed to prove that plaintiff concealed from defendants the fact that the property was in a flood plain.

As we stated in *Christopher v. Evans, supra*:

> *Conceal* means "To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).
>
> In *Mitchell v. Locurto*, 79 Cal. App. 2d 507, 514, 179 P.2d 848, 851-52 (1947), the court defined *conceal* as follows: "The word 'conceal' pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact. (Restatement of the Law, Contracts, § 471, p. 891 et seq.; Restatement of the Law, Restitution, § 8, p. 32 et seq.; 8 Words and Phrases, Perm. Ed., 328-342.) It has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld."

219 Neb. at 55-56, 361 N.W.2d at 196.

Defendants in this case did not prove what affirmative action plaintiff took to hide, secrete, or withhold from the knowledge of defendants the fact that the property was in a flood plain. Defendants did show that plaintiff knew when it transacted a loan on different property which was located within the same subdivision as the property involved in this case that the subdivision was in a flood plain, and that plaintiff had informed the buyer of the other property of that fact. Defendants also showed that plaintiff had a flood map in its loan origination office. But showing knowledge on plaintiff's part is not enough. Defendants had to show that plaintiff hid the true facts from defendants. The most defendants could

prove was that plaintiff's failure to check the box on the loan commitment entitled "Flood Insurance Mandatory" was an "oversight." As plaintiff's counsel stated in oral argument, this "oversight" may have been negligence, but it does not amount to concealment. Indeed, as soon as defendant Gray informed plaintiff that the property was in a flood plain, plaintiff went out and purchased flood insurance to cover both its and defendants' interests in the property, and paid the premium itself.

Because plaintiff did not conceal anything from defendants, there was no fraud, and rescission was properly denied.

Goltl, in a motion for a new trial, requested in the alternative that the court permit his petition to be amended to one in damages and that that issue be tried and determined by the court. In support of his position he cites us to *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). In that case defendants contracted to sell plaintiffs a motel, representing that, among other things, the premises were free of termites. As it turned out, the property was infested with termites. Plaintiffs sued for rescission, and defendants counterclaimed for specific performance.

In determining that fraud was present, this court stated: "We think, under the circumstances here disclosed, appellants [plaintiffs] had a right to rely upon the statements made by the executor Fred E. Williams, and in fact, that they did rely thereon to their subsequent injury." *Id.* at 578, 71 N.W.2d at 141. However, the denial of rescission by the trial court because of laches on the part of plaintiffs was affirmed on appeal.

By the same token, although the trial court granted defendants specific performance, this court reversed on the ground that because defendants had made misrepresentations, such a remedy would be unjust. In the final analysis, the cause was remanded to the trial court with directions to permit plaintiffs to elect to amend their cause of action for one in damages, stating the "cause of action in either event is fraud and the allegations of fact would be precisely the same in substance, the only substantial difference between the two being the form of relief prayed for." *Id.* at 587, 71 N.W.2d at 146.

What appellants here overlook is language in this court's opinion just preceding the above-quoted language:

> As held in Reinertson v. Struthers, *supra*: "* * * the failure to secure relief based upon a rescission, *unless for a failure to establish the fraud*, simply leaves the party who sought it in the attitude of having conclusively affirmed the contract. But affirmance of the contract does not waive the fraud, nor bar the right to recover damages, but bars a subsequent rescission merely."

(Emphasis supplied.) 160 Neb. at 587, 71 N.W.2d at 146. Such, of course, is not the case here. Because we find no fraudulent concealment on the part of the plaintiff, the defendants are not permitted to elect to pursue the alternative remedy for damages.

The judgment is affirmed.

AFFIRMED.

MICHELLE DELAWARE, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, MARY ANN DELAWARE, APPELLANT, V. PETER VALLS ET AL., APPELLEES.

409 N.W.2d 621

Filed July 31, 1987. No. 85-931.

1. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
2. _____: _____: _____. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
3. **Tort-feasors: Negligence: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Stephen L. Gerdes of Schrempp, Hoagland, Gray, Gerdes & Salerno, for appellant.

James L. Quinlan and Amy S. Bones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Michelle Delaware, alleges she was injured when a dirt bike motorcycle on which she was a passenger collided within the intersection of Madison and 35th Streets in Omaha with an automobile driven by defendant-appellee Albert Allen, Jr. She claims that defendants-appellees Peter and Barbara Valls negligently failed to warn about the presence of, and negligently grew, maintained, and failed to trim, certain vegetation on the realty they own at the northwest corner of the intersection, and negligently parked a truck on Madison Street within 30 feet of the intersection, all contrary to ordinances of the city of Omaha, which negligence was a "direct, proximate and contributing cause" of her injuries and damages. Concluding that the Vallses' negligence furnished only a condition by which Delaware's injuries were made possible through the subsequent independent negligence alleged on the part of Allen and the actions of Francis James Diggins, the driver of the motorcycle, the trial court sustained the Vallses' motion for summary judgment and dismissed Delaware's petition as to them. Delaware assigns the ruling as error, urging that whether Diggins' negligence was a superseding cause and whether the vegetation and parked truck were proximate causes presented fact issues for a jury to resolve. We affirm.

Diggins was driving the motorcycle southward on 35th Street. He testified that he stopped for the stop sign, "walked up a little bit with the bike" into the intersection, looked in both directions, did not see any approaching vehicles, and "started across the intersection." He testified that when he looked to the west on Madison Street, his vision was hampered "to some

extent" by a parked vehicle and "a little bit" by hedges on the northwest corner of the intersection. He also said, however, that as he looked west on Madison Street, he could see to the top of a hill.

Allen testified that he was traveling east on Madison Street at approximately 25 miles per hour when the motorcycle "came from . . . no place." Allen also testified that there were tall hedges and a parked truck in front of the Valls property. According to Allen, Diggins did not obey the stop sign.

Delaware, however, testified that Diggins did stop for the stop sign. She also testified that both the hedges and the parked truck blocked her vision and that she did not see the Allen automobile until its bumper was right at her leg.

Various Omaha city ordinances prohibit parking a vehicle within 30 feet of an intersection, planting trees within 35 feet of an intersection, and maintaining shrubbery more than 2½ feet tall within the triangle formed by the adjacent curblines of two intersecting streets and the line joining points "distant forty (40) feet on each side line from their point of intersection," and require landowners to trim, prune, and spray trees abutting a street as "will remove any hazard to life or property." Omaha Mun. Code, ch. 36, art. VI, § 36-126; ch. 37, art. I, § 37-9; ch. 37, art. IV, § 37-72; and ch. 37, art. V, § 37-94 (1980).

Since at least 1923, when *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N.W. 117, was decided, the rule in this jurisdiction has been that passive negligence which does nothing more than furnish a condition by which injuries are made possible through the subsequent independent negligence of another is not actionable. In *Steenbock* an employee of the Omaha Country Club had negligently placed a flagpole across a driveway. Subsequently, the pole was negligently struck by the car of the defendant Crofoot and knocked into the plaintiff. In denying recovery the court concluded that the placement of the pole and the subsequent negligent striking of it were not concurrent acts, and, thus, the condition created by the placement of the pole was not a proximate cause of the plaintiff's injury.

The foregoing rationale has been applied in a variety of situations; for example, *C.S. v. Sophir*, 220 Neb. 51, 368

N.W.2d 444 (1985) (failure to clear weeds a condition and not a proximate cause of criminal assault on tenant); *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983) (inadequate lighting a condition and not a proximate cause of criminal assault on tenant); *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978) (escape of horse due to disrepair of fence a condition and not a proximate cause of vehicle collision); *Connolley v. Omaha Public Power Dist.*, 185 Neb. 501, 177 N.W.2d 492 (1970) (trespass action in which existence of overhead electric line a condition and not proximate cause of injury when flagpole lifted into line); *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 126 N.W.2d 477 (1964) (construction barricades placed so as to route traffic onto unobstructed portion of road a condition and not a proximate cause of accident); *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d 531 (1960) (double-parked truck obscuring vision a condition and not proximate cause of collision with pedestrian); *Anderson v. Byrd*, 132 Neb. 588, 272 N.W. 572 (1937), *after rehearing* 133 Neb. 483, 275 N.W. 825 (dense, damp, and impenetrable cloud of smoke caused by previously wrecked railroad engines merely a condition; thus, defendant automobile driver not entitled to an instruction that accident was proximately caused by smoke which was created by one not involved in the collision nor named as a party).

However, the preceding situations involving passive preexisting negligence have been distinguished from those situations in which active preexisting negligence combines with subsequent independent acts of negligence to cause injury. In the latter situations the preexisting and subsequent negligence have been held to combine and become concurrent acts of negligence such that each may be a proximate cause of the resulting injury. For example, *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987) (without discussing condition-cause distinction held that continuing failure to provide security after knowledge of known perpetrator's repeated criminal acts on premises raised jury question as to whether landlord should have foreseen criminal assault on tenant); *London v. Stewart*, 221 Neb. 265, 376 N.W.2d 553 (1985) (driving on wrong side of road up to time of collision a

proximate cause of collision, not a mere condition); *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981) (smoke produced by burning of weeds at time of collision a proximate cause, not a condition); *Johnson v. Metropolitan Utilities Dist.*, 176 Neb. 276, 125 N.W.2d 708 (1964) (failure to warn of obstruction created by parking tractor so as to protrude into street constituted continuing negligence and thus proximate cause, not a condition).

Delaware invites us to abandon this historical distinction between cause and condition. In doing so, she calls our attention to the fact that the distinction has been criticized as meaningless, Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103 (1911), providing no more guidance than calling something "blamable" or "not blamable," Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 136 (1909), and as being "almost entirely discredited," Prosser and Keeton on the Law of Torts, *Proximate Cause: Scope of the Problem* § 42 at 278 (5th ed. 1984).

Delaware also urges that we abandon our traditional definition of "efficient intervening cause" and adopt the standard set forth in the Restatement (Second) of Torts § 447 (1965). We have defined an efficient intervening cause as a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. *London v. Stewart, supra.* It is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff. *Corbet, Inc. v. County of Pawnee*, 219 Neb. 622, 365 N.W.2d 437 (1985). The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). The Restatement, *supra* at 478, on the other hand, provides:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the

actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Although there may be merit in the criticisms of the cause-condition distinction, we need not examine the validity of that distinction in this case, for we are not persuaded that any good reason exists for abandoning the traditional efficient intervening cause concepts. That being so, it matters not how the Vallses' conduct is characterized, for they were not bound to anticipate and cannot be said to have contemplated that Diggins would negligently attempt to traverse the intersection when he could not see what he needed to see in order to do so safely or that Allen would, as it is alleged, fail to see Diggins in time to avoid the collision. Thus, Diggins' negligence and that alleged on the part of Allen are efficient intervening causes.

As to the Vallses, there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and they are entitled to judgment as a matter of law. Thus, the summary judgment dismissing Delaware's petition against them is correct. *Seagren v. Peterson,* 225 Neb. 747, 407 N.W.2d 790 (1987); *Smith v. Weaver,* 225 Neb. 569, 407 N.W.2d 174 (1987).

AFFIRMED.

IN RE APPLICATION A-15738 OF THE HITCHCOCK AND RED WILLOW IRRIGATION DISTRICT ET AL. HITCHCOCK AND RED WILLOW IRRIGATION DISTRICT ET AL., APPELLANTS, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLEES.

410 N.W.2d 101

Filed July 31, 1987. No. 86-008.

1. **Administrative Law: Waters: Appeal and Error: Case Overruled.** The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
2. **Constitutional Law: Waters.** The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.
3. _____: _____. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
4. **Waters.** The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water.
5. _____. The second characteristic of the appropriative right of water in a natural stream is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.
6. **Waters: Words and Phrases.** Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
7. **Waters.** Although there may be some unappropriated water available at a proposed diversion point, the existence of a dependable water supply is essential to the success of any irrigation project and where, on the average, but an insignificant supply of water in relation to the maximum demand of the proposed appropriator is available, there is not a source of unappropriated water at the proposed diversion site.
8. _____. For a quantity of unappropriated water to be available at a proposed diversion point, it must be available in a supply which is fairly continuous and dependable.
9. **Statutes: Words and Phrases: Waters.** Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an

appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).

10. **Waters.** In order to be able to assess the impact on the public interest of a proposed project for the diversion of water, the project's design must be definite enough to reflect its impacts and implications to generally apprise the public of the efficacy of the proposed use of the planned facility and of its potential impact.

11. _____. Where the evidence supports the proposition that the benefits to the state would be greatly enhanced by using the available unappropriated water in the river of its origin, rather than to divert it to another river basin, a denial of such transbasin diversion is demanded by the public interest.

Appeal from the Department of Water Resources. Affirmed.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellants.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee State of Nebraska.

George E. Svoboda of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellees Lower Platte North Natural Resources District et al.

Lyle B. Gill, Fremont City Attorney, for appellee City of Fremont.

Richard G. Kopf of Cook, Kopf & Doyle, P.C., for appellee Central Platte Natural Resources District.

Jess C. Nielsen of Nielsen & Birch, for appellee Twin Platte Natural Resources District.

Christopher H. Meyer, for appellee National Wildlife Federation.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ., and MCCOWN, J., Retired.

HASTINGS, J.

Three irrigation districts in southwest Nebraska appeal from an order entered by the director of the Nebraska Department of Water Resources (department) denying their application for authority to divert water from the South Platte River for storage in Enders Reservoir near Imperial, Nebraska. We

affirm.

The Hitchcock and Red Willow (H & RW), Frenchman Valley, and Frenchman-Cambridge Irrigation Districts filed an application with the department on December 19, 1980, for a permit authorizing the impoundment of approximately 45,000 acre-feet of water in Enders Reservoir. The source of water was listed as the South Platte River at a location near Big Springs, Nebraska. The appellants proposed a transbasin diversion of water from the South Platte River basin to the Republican River basin, as the water would be transported about 45 miles south by pipeline or canal to the Frenchman River, which flows into Enders Reservoir and eventually into the Republican River. Such a diversion was proposed to supplement the diminished flows in the Frenchman River and resulting lower water levels in Enders Reservoir brought about in part by increased groundwater development in the area. The appellants listed 1990 as the approximate date that water would first be impounded.

The magnitude of the record in this case points out the difficult and almost impossible task that our own rules have imposed upon this court. The application for diversion was filed with the Nebraska Department of Water Resources on December 19, 1980, which resulted in over 30 days of hearings culminating with an order entered by the director on November 4, 1985. The direct testimony constitutes approximately 5,600 pages of the bill of exceptions, consisting of some questions nearly a page in length and many answers covering several pages. In addition, there are exhibits in this case exceeding 3,000 pages of testimony from *In re Applications A-15145 through A-15148*, now also pending in this court as case No. 86-692. Finally, there are approximately 400 technical exhibits, ranging from single-page statistical printouts and maps to books and scientific treatises exceeding 400 pages in length.

The foregoing statement is only relevant to point up to us the possible need of altering our appellate practice to require the filing of a manageable statement of the case in lieu of a complete record of this magnitude.

The record does disclose that Enders Reservoir is owned by the Bureau of Reclamation, U.S. Department of the Interior.

Water is delivered from the reservoir to the H & RW and Frenchman Valley Irrigation Districts through canals originating at a diversion dam about 50 river miles downstream from Enders Reservoir. The canals serve about 11,500 acres in the H & RW Irrigation District in Hitchcock and Red Willow Counties and about 9,600 acres in the Frenchman Valley Irrigation District in Hitchcock County, and the two districts together planned to use 35,000 acre-feet of the proposed diversion. The Frenchman-Cambridge Irrigation District, the majority of which is located downstream from the other two districts on the Republican River, joined as an applicant for the remaining 10,000 acre-feet.

Objections to the application were filed by numerous parties, including conservation groups, natural resource districts, and municipalities. The director conducted a lengthy hearing on the application. At the request of the parties, the proceedings were governed by the rules of evidence applicable in district court.

Pursuant to the Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 et seq. (Reissue 1984), the applicants and the director initiated consultation with the Game and Parks Commission. The commission prepared a written biological opinion which concluded that the proposed diversion would jeopardize the continued existence of the whooping crane, bald eagle, and least tern. The director first admitted the biological opinion into evidence only to show consultation with the Game and Parks Commission, but he subsequently admitted it for the truth of the matter asserted therein. The director also denied requests by the applicants and one of the objectors for authorization to take depositions of the authors of the biological opinion and to subpoena them as witnesses.

The director issued an order dated November 4, 1985, denying the application and concluding the following: (1) that there was not a source of unappropriated water at applicants' proposed diversion point sufficient to meet their demand; (2) that when considering the provisions of Neb. Rev. Stat. § 46-289 (Reissue 1984), which sets forth factors to consider when evaluating an interbasin transfer of water, applicants

failed to meet the public interest test, most seriously falling short in addressing impacts to fish and wildlife; and (3) that applicants did not overcome the burden placed upon them by § 37-435(3) of the Nongame and Endangered Species Conservation Act to show that their proposal would not adversely impact endangered species.

The applicants raise no issues based on differences of testimony regarding facts, but raise the following assignments of error: (1) that the director incorrectly considered the likelihood of success of the proposed irrigation project when determining whether there was unappropriated water; (2) that the director applied an incorrect balancing test when considering the factors listed in § 46-289; (3) that § 46-289 is unconstitutional; (4) that the director erred in finding that the applicants have the burden of proving compliance with the Nongame and Endangered Species Conservation Act; (5) that the director erred in admitting the biological opinion into evidence; (6) that the director erred in not allowing the authors of the biological opinion to be deposed or called as witnesses; and (7) that § 37-435(3) is unconstitutional as applied to the facts in this case.

We need first to address the standard of review to be applied by this court. In that regard, we have not been completely consistent. In *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960), a water appropriation case, we stated in a rather straightforward manner:

> This court has concluded in cases comparable with that at bar that on an appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary.

Id. at 268, 102 N.W.2d at 423. In other words, that would suggest a review for error rather than a de novo hearing.

Such a review would not be inconsistent with the review of an administrative agency's order on appeal to the district court; i.e., was the order in excess of the statutory authority of the agency and was the order unsupported by competent, material,

and substantial evidence. Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984).

That such an appeal falls under the provisions of the Administrative Procedures Act is suggested by Neb. Rev. Stat. § 84-901 (Reissue 1981), which defines an agency as "each board, commission, department . . . or other administrative office or unit of the state government . . . ." Additional recognition was given to this proposition in the case of *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981), wherein we held that because "the provisions of the Administrative Procedures Act are applicable to the Department of Water Resources . . . [u]pon motion by the appellants, the use of formal rules of evidence could have been required." *Id.* at 167, 313 N.W.2d at 275.

In *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985), we interpreted Neb. Rev. Stat. § 84-918 (Reissue 1981) of the Administrative Procedures Act, which provides that "[a]n aggrieved party may secure a review of any final *judgment of the district court* . . . by appeal to the Supreme Court," which appeal "shall be heard de novo on the record." (Emphasis supplied.) Although perhaps recognizing the absence of logic in requiring this court to review de novo a judgment of the district court which never did have an opportunity to make de novo findings, see concurrences of Shanahan, J., and Boslaugh, J., we nevertheless felt compelled to follow the unambiguous language prescribed by the Legislature. We therefore held that we would review the record of the administrative agency de novo and come to an independent conclusion without regard to what either the agency or the district court had done.

Finally, in the case of *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), involving a pure interpretation of law as applied by the Nebraska Department of Water Resources, we perhaps gratuitously, and at least facially logically, following *In re Water Appropriation Nos. 442A, 461, 462, and 485, supra*, and *Haeffner, supra*, determined that "our review of an agency's decision under the Administrative Procedures Act is de novo on the record." 223 Neb. at 436, 390 N.W.2d at 510. We therefore stated that we would review that record under that standard.

However, what we have failed to do, perhaps because that precise issue has not previously been specifically presented to us, is to examine in detail the enabling legislation for an appeal from the Department of Water Resources and the exception as to appeals contained in the Administrative Procedures Act. Neb. Rev. Stat. § 46-210 (Reissue 1984) provides in part as follows:

> The procedure to obtain such reversal, modification, or vacation of any such decision or order upon which a hearing has been had before the Department of Water Resources shall be governed by the same provisions in force with reference to appeals and error proceedings from the district court to the Supreme Court of Nebraska.

Neb. Rev. Stat. § 25-1911 (Reissue 1985) provides that "[a] judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for *errors appearing on the record*." (Emphasis supplied.)

Finally, § 84-917 of the Administrative Procedures Act, which prescribes the method for the original review of an administrative agency's order, provides further, as subsection (7), "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal."

Because the Administrative Procedures Act provides only for a review by the Supreme Court of the judgment of the district court and not of the agency, because the act is not applicable when another method of appeal has been prescribed, and because another method of review has been provided in the legislation specifically providing for an appeal of the order of the Department of Water Resources, we hold that the proper standard of review for this court to follow in cases such as this one is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006, supra*, holds to the contrary, it is overruled.

Such position is also supported by logic. We have held in appeals from the Public Service Commission, where review is

also directly to this court, that we would not second-guess the commission or make independent findings or determinations of matters which are peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed on appeal absent a showing of illegality, arbitrariness, capriciousness, or unreasonableness. *In re Application of Northwestern Bell Tel. Co.*, 218 Neb. 563, 357 N.W.2d 443 (1984).

When consideration is given to the fact that our statutes require that members of the Public Service Commission need only be citizens and voters of the state, Neb. Rev. Stat. § 75-101 (Reissue 1986), whereas the director of the Department of Water Resources, who, together with the state hydrologist, conducted this hearing, is required to be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work, Neb. Rev. Stat. § 46-701 (Reissue 1984), there would seem to be little doubt but that similar deference should be afforded his expertise involving "judgment and policy determination."

Appellants contend in their first assignment of error that the director applied an incorrect definition of the term "unappropriated water," when he determined there was not a source of unappropriated water at the proposed "diversion point sufficient to meet their demand." They assert that the director incorrectly considered whether in his opinion the proposed irrigation project would be successful, and incorrectly based his decision on his determination that it probably would not be.

Neb. Const. art. XV, § 6, provides in part: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest." Neb. Rev. Stat. § 46-235 (Reissue 1984) provides in part that "[i]f there is unappropriated water in the source of supply named in the application, if such application . . . is not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the Department of Water Resources shall approve the same . . . ." The term "unappropriated water" is not expressly defined in the

irrigation code. Therefore, we must consider the inherent characteristics of the appropriative right to use the state's water, for the term "unappropriated water" finds its correct legal meaning therein.

The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Neb. Const. art. XV, § 5. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right. *Frenchman Valley Irr. Dist. v. Smith*, 167 Neb. 78, 91 N.W.2d 415 (1958). The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water. *Id.*

The second characteristic of the appropriative right is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired. *State v. Birdwood Irrigation Dist.*, 154 Neb. 52, 46 N.W.2d 884 (1951). For example, as part of the requirement of beneficial use, the Department of Water Resources is expressly authorized by statute, after notice and hearing, to forfeit a water right in whole or in part where it appears that the water appropriation has not been used for some beneficial or useful purpose or, having been so used at one time, has ceased to be used for such a purpose for more than 3 years, unless there has been sufficient cause for such nonuse. Neb. Rev. Stat. §§ 46-229.02 to 46-229.04 (Reissue 1984); *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981). In addition, an appropriation right can be lost through abandonment or for nonuser for the amount of time found in Neb. Rev. Stat. § 25-202 (Reissue 1985) regarding actions for the recovery of title or possession of real estate. *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956). Thus, first of all, "unappropriated water" is that water which is available for appropriation because it is not subject to an existing appropriation right.

Neb. Rev. Stat. § 46-203 (Reissue 1984) establishes a "first in time is first in right" seniority system for water appropriations. The priority of an appropriation dates from the filing of an application in the office of the Department of Water Resources

for a permit to make an appropriation. Neb. Rev. Stat. § 46-205 (Reissue 1984). The department is required to have public hearings on such applications, to receive evidence relevant to the matter under investigation, and to render a decision in writing. Neb. Rev. Stat. § 46-209 (Reissue 1984).

The record of the department's proceedings in the present case reveals that the director's conclusion relative to the availability of unappropriated water rests upon a large amount of technical and other evidence showing the historical usage of water taken from the South Platte River and the anticipated usage of such water in the future, taking into account numerous variables. Various expert witnesses testified as to the amount of water available at the proposed diversion point. The estimates of flows available for diversion ranged from an annual average of 6,200 acre-feet based on daily flow records and a facility which could pump 125 cubic feet per second, to an annual average of 26,500 acre-feet based on monthly flow records and a facility which could pump 175 cubic feet per second.

The director determined that an approach using mathematical relationships correlating river reach gains/losses and inflows and outflows, in conjunction with daily measuring station river flow data, was most appropriate for evaluating the existence of unappropriated water in the proposed source of supply. Using elements of this approach, Morton Bittinger, an engineer from Colorado who testified for one of the objectors, estimated that an average of 6,200 acre-feet of water would have been available annually based on daily flow records and a facility which could pump 125 cubic feet per second. Bittinger estimated that 8,400 acre-feet would have been available annually based on daily flow records and a facility which could pump 175 cubic feet per second. Marvin Dan Schmidt, an engineer from California who testified for the appellants, estimated that an average of 15,400 acre-feet would have been available annually based on daily flow records and a facility which could pump 125 cubic feet per second and that an annual average of 18,800 acre-feet would have been available based on daily flow records and a facility which could pump 175 cubic feet per second.

The director considered the fact that periodic water

shortages occur in the South Platte valley, caused in part by climatic factors and extensive upstream diversion. He also considered the impact of the South Platte River Compact, an agreement between Nebraska and Colorado that allocates to Colorado, during parts of the year, much of the water of the South Platte River flowing through that state. In his order denying the appellants' application, the director stated the following: "[I]t is apparent that Applicants' proposal rests upon developing its water supply from a source already extensively exploited . . . . In terms of available water supply, considerable risk is inherent in Applicants' proposal. They seek to remove some, perhaps at times all, of the last drops."

The director acknowledged that there is some unappropriated water available at the proposed diversion point. However, he declined to find the existence of unappropriated water because he considered the amount available to be inadequate. The director stated that "[t]he existence of a dependable water supply is essential to the success of any irrigation project" and that "[a]s an average, less than one-fourth Appellants' maximum demand would have been available at their proposed diversion point." Therefore, he concluded that the application should be denied because "[t]here is not a source of unappropriated water at Applicants' proposed South Platte River diversion point sufficient to meet their demand."

While it is true that some unappropriated water is present during times of high flow at the proposed diversion point, to be available in a practical sense the supply of water must be fairly continuous and dependable. *Wyoming v. Colorado*, 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922). The director concluded that based on historical flow records, the appellants would not be able to withdraw any water in a number of years, sometimes consecutive. Only in times of prolonged high flows would there be enough water available to enable the appellants to divert the 45,000 acre-feet for which they applied. Clearly, water would not be present in such a quantity as to supply the appellants' desired amount on a fairly continuous and dependable basis. Although appellants do not quarrel with that factual finding, it is their argument that the director is not entitled, as a matter of

law, to base his refusal to allow the application on the unlikelihood of success of the irrigation project.

As early as 1910, in *Young & Norton et al. v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (1910), the New Mexico court held that it was proper to refuse an appropriation of water for a project which appeared doomed to failure. That court stated:

> If there is available, unappropriated water of the La Plata river for only five or six thousand acres of land, it would be contrary to the public interest that a project for irrigating fourteen thousand acres with that water should receive an official approval which would, perhaps, enable the promoters of it to market their scheme, to sell stock reasonably sure to become worthless, and land which could not be irrigated, at the price of irrigated land. . . . The failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who are depending on it, but besides tends to destroy faith in irrigation enterprises generally.

Id. at 677-78, 110 P. at 1050.

The Texas Supreme Court also has suggested that the term "unappropriated water" may include the element of sufficiency. In *Lower Colorado River Auth. v. Texas Dept.*, 689 S.W.2d 873 (Tex. 1984), the court set aside a permit granted by the Texas Water Commission authorizing a water district to use 113,000 acre-feet per year from the Colorado River to form a lake. The applicable Texas statute read in pertinent part as follows: "(b) The commission shall grant the application only if: . . . (2) unappropriated water is available in the source of supply . . . ." Tex. Water Code Ann. § 11.134 (Vernon Supp. 1987). The evidence showed that after taking into consideration existing water rights, very little water would be available for appropriation at the proposed reservoir site. The estimated firm yield of the reservoir for the quantities of appropriable water available was 3,120 acre-feet per year. The court set aside the permit because there was an insufficient supply of unappropriated water for the proposed project. See, also, *Tanner v. Bacon, State Engineer, et al.*, 103 Utah 494, 136 P.2d 957 (1943).

In Nebraska, the Department of Water Resources may, upon

examination of an application, endorse it approved for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for, and may also impose such other reasonable conditions as it deems appropriate to protect the public interest. § 46-235. In the present case, the director chose not to approve the application for a lesser amount of water. Generally, the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). Section 46-235 gives discretionary power of approval to the department. *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956). The predecessor to the Department of Water Resources was viewed as having been made the guardian of the public welfare in the appropriation of the public waters of the state, necessarily devolving upon it a large discretion in such matters. *Kirk v. State Board of Irrigation*, 90 Neb. 627, 134 N.W. 167 (1912). In light of this discretionary power, it cannot be said that the use of the word "may" in its ordinary, permissive, and discretionary sense in § 46-235 would defeat the intent of the drafters.

The appellants argue that the director incorrectly refused to consider methods of diversion other than direct pumping from river flow with facilities capable of pumping either 125 cubic feet per second or 175 cubic feet per second and that greater amounts of water could be diverted using other methods. In his order, the director stated that consideration of other types of facilities, which might be less costly and more effective, was not warranted because the use of such devices was not narrated by any of the appellants' witnesses. While the appellants' witness Schmidt mentioned other methods of diversion, such as storage facilities along the South Platte River or the use of a retention recharge facility and a well field, his testimony focused on the use of a pumping facility with a maximum capacity of either 125 cubic feet per second or 175 cubic feet per second. Witnesses for the appellants and the objectors estimated the amount of water available for diversion based on the use of each of the two

facilities, and the possible impacts of the diversion were evaluated based on such facilities.

While "blueprint quality" plans need not be presented when applying for a permit to appropriate water, we agree with the following statement of the Idaho Supreme Court:

> In order to be able to assess a project's impact on the public interest, the project's design must be definite enough to reflect its impacts and implications. . . .
>
> . . . In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact.

Shokal v. Dunn, 109 Idaho 330, 339-40, 707 P.2d 441, 450-51 (1985). The record in the present case reflects that specific evidence was presented regarding only a pumping facility with a maximum capacity of 125 cubic feet per second or 175 cubic feet per second. Therefore, the director correctly evaluated the application in light of the facilities about which evidence was presented.

There was competent evidence, without regard to the rules relating to transbasin diversion found in § 46-289, to support the proposition that the benefits to the State of Nebraska would be greatly enhanced by using the available unappropriated water, if any, in the central Platte area rather than for the Enders Reservoir diversion. Neb. Rev. Stat. § 46-204 (Reissue 1984) permits denial of water diversion when such denial is in the public interest. Such appears to be the case here.

Because we find that the evidence supports the denial of the application based on a lack of unappropriated water to adequately support the appellants' proposed project, because the director's findings regarding the public interest support a denial of the application, and because the director's findings are not affected by errors of law, we find it unnecessary to consider the appellants' other assignments of error. The order of the Department of Water Resources is affirmed.

AFFIRMED.

IN RE INTEREST OF R.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. D.K., APPELLANT.

410 N.W.2d 110

Filed July 31, 1987. No. 86-964.

1. **Judicial Notice: Records.** A court must take judicial notice of its own records in the case under consideration.
2. **Parental Rights: Trial.** Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
3. _____: _____. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
4. **Juvenile Courts: Records.** Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
5. **Parental Rights: Appeal and Error.** An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
6. **Parental Rights.** An order of termination of parental rights must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative.
7. _____. Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay.
8. **Parental Rights: Abandonment.** A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
9. **Parental Rights.** A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.
10. _____. A child's future need not be subject to the risks of awaiting uncertain parental maturity.
11. _____. Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Julie A. Frank of Pollak & Frank, for appellant.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for appellee.

Deborah R. Pred of Fiedler, Kushner & Pred, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

D.K., the mother, appeals from the September 22, 1986, order of the separate juvenile court of Sarpy County, Nebraska, terminating her parental rights to her daughter, R.A.

The child was born on April 24, 1976, to L.A. and D.K. The couple was divorced in February of 1981, with custody of the child awarded to the mother. She returned custody of the child to the father within 3 days following entry of the decree. Later in 1981, after regaining custody of the child, the mother enlisted in the Army and again relinquished custody to the father.

In August of 1983, the father turned custody of the child over to the separate juvenile court and requested its assistance. The mother was unavailable as an immediate custodial parent at that time because she was still in the service and was stationed in Virginia. Prior to the father's request for assistance from the court, the child was hospitalized at the Nebraska Psychiatric Institute from May 6 to July 16, 1983. She was diagnosed there as suffering an adjustment disorder with mixed disturbance of emotion. The hospitalization was precipitated by the child's threats to kill her stepmother and to burn down the family residence. These threats continued after her hospitalization. At that point, the child's father requested that his mother, the child's grandmother, take custody of the child. Subsequent to taking custody of her, the grandmother contacted the court requesting assistance for the child. Upon being detained, the child was placed in Midlands Hospital and, within a week of being there, alleged that she had been sexually abused by her paternal grandfather, A.A.

On August 15, 1983, a petition was filed in the separate juvenile court alleging that the child was homeless, destitute, or without proper support through no one's fault. See Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). The child's mother's address was listed as unknown in the petition.

Following an October 4, 1983, hearing on the petition, the child was adjudicated to be a child within the meaning of § 43-247(3)(a) and was placed in the custody of the Nebraska

Department of Social Services. At the October 4 hearing, the father stipulated to the truth of the contents of the petition. The court relied on its own "social file" to establish a factual basis for the stipulation. The social file, otherwise known as the predisposition evaluation, was not offered into evidence. The mother was not present or represented by counsel at this hearing.

Subsequent further dispositional hearings were held on November 23, 1983; April 11, 1984; October 4, 1984; April 18, 1985; October 9, 1985; and April 10, 1986. The mother either appeared with or was represented by counsel at all of these hearings. However, no record of the dispositional hearings was made. The court entered orders pursuant to the hearings requiring the mother to abstain from the consumption or use of alcohol and controlled substances; participate in a Parents United program or its equivalent; participate in counseling; pay the costs of her child's medical care and therapy; submit to chemical and psychological evaluations; complete a parenting program; submit to a home-study evaluation; obtain and maintain housing suitable for herself and her child; and maintain gainful employment. She was also allowed only supervised visitations with her child.

The father relinquished his parental rights to his child on April 4, 1984. From that point on, he and his second wife were no longer subjects of the juvenile court orders.

On June 26, 1986, the Sarpy County deputy county attorney filed a supplemental petition seeking termination of the mother's parental rights to her child. The petition alleged that reasonable efforts under direction of the court had failed to correct the conditions leading to the determination that the child was a child within the meaning of § 43-247(3)(a). Termination was sought pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984).

On September 15, 1986, a hearing was held on the supplemental petition. The mother was not present but was represented by counsel. The State made an oral request that the court take judicial notice of its own records, more specifically its "social file," which encompassed exhibits 1 through 28. The exhibits consisted of the court's predisposition report and an

addendum to it; reports and letters from the child's counselor; reports of the Child Protective Services workers; letters to the court from the mother; reports from the mother's counselors; further disposition reports of the court; and a psychological evaluation of the mother. The mother's attorney entered hearsay objections to exhibits 1, 2, 3, 4, 8, 9, 10, 11, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, and 28. The court stated that exhibits 1 through 28 had all been considered in previous proceedings in the case. Judicial notice of those exhibits was taken.

In addition to the aforementioned exhibits, the State introduced the testimony of the child's therapist, Janet Guilfoyle, and that of the Child Protective Services worker then assigned to the case, Ronda Newman. Newman was also called as the mother's sole witness.

On September 22, 1986, the juvenile court found there was clear and convincing evidence to show that reasonable efforts under the direction of the court had failed to correct the conditions originally leading to the determination that the child was a child within the meaning of § 43-247(3)(a). The court also found that it was in the best interests of the child to terminate the mother's parental rights and ordered the mother's parental rights to her child terminated.

On appeal from the order of termination, the mother essentially raises three issues: (1) whether the juvenile court abused its discretion and committed reversible error by admitting exhibits 1, 2, 3, 4, 8, 9, 10, 11, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, and 28, which consisted of hearsay where said exhibits were admitted solely because they came from the social file maintained by the juvenile court and were originally admitted into the social file without formal offers by any party, thereby denying appellant the opportunity to object to their admission into the file; (2) whether the evidence was sufficient to support the juvenile court's order terminating the mother's parental rights; and (3) whether the finding that reasonable efforts had failed to correct conditions leading to the determination that R.A. was a child within the meaning of § 43-247(3)(a) was contrary to the evidence presented, offered, and received at trial and was contrary to law.

The mother's first assignment of error is basically that she

was denied due process because receipt of the exhibits in question over her hearsay objections denied her the opportunity to cross-examine the witnesses and allowed her parental rights to be terminated on a lesser standard of proof than required.

The issue raised is a result of the juvenile court's failure to make a verbatim record of its dispositional proceedings. Due to that failure, there is no record before this court that the social file exhibits were ever received in evidence prior to their receipt at the termination hearing, that the mother ever had an opportunity to cross-examine the authors of the exhibits, or that she ever had an opportunity to inspect the exhibits prior to their introduction at the adjudication hearing on the supplemental petition. Further, there is no foundation evidence for any of these exhibits.

During the course of the October 4, 1983, adjudication on the original petition, the juvenile court determined there was a factual basis for the father's stipulation to the allegations in the petition, based on a predisposition evaluation which was not then received in evidence. The court did so to protect both the child's and her father's interests in confidentiality. Upon finding the child to be a child within the meaning of § 43-247(3)(a), the court made an immediate dispositional inquiry. Again, with the court, the State, and the guardian ad litem all citing concerns of confidentiality, disposition was had off the record. No verbatim record was made of subsequent further dispositional hearings, although they are evidenced by the court's findings and orders. No explanation is offered as to why a record of these proceedings was not made.

In *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979), this court indicated that "[a] court must take judicial notice of its own records in the case under consideration" and that it "has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined." Like the case at bar, *Norwood* involved a juvenile court's taking judicial notice of its prior proceedings in a termination of parental rights adjudication. Under the

aforementioned rules, this court found no error in the court's consideration of its earlier proceedings in the *Norwood* case. The rules relied on in *Norwood* imply that exhibits considered in prior proceedings may be noticed pursuant to an examination of its records of those proceedings. In effect, that was what the juvenile court attempted to do in this case.

Nevertheless, it is questionable whether the juvenile court could take judicial notice of the exhibits in question in this case under the authority of *Norwood, supra*. In this case, there is no verbatim record of the dispositional hearings at which the exhibits were allegedly considered.

In *In re Interest of D.*, 209 Neb. 529, 531, 308 N.W.2d 729, 731 (1981), we stated that in termination cases, because the record must establish by clear and convincing evidence the basis for termination of parental rights, observance of more formal court procedures is "encouraged." In that case, the evidence before the court consisted mostly of letters and unsworn testimony which was not objected to. As such, it was properly before the court. Nevertheless, this court expressed concern that there was no opportunity for cross-examination of the authors of the various reports to determine the bases of their conclusions.

Absent a verbatim record of the prior dispositional proceedings in this case, there is no foundation evidence for the questioned exhibits and no evidence that there was an opportunity to cross-examine the authors of the exhibits as to their contents, or of their availability to the mother or her counsel prior to the termination hearing. The fact that the juvenile court stated that it had previously considered the exhibits does not alleviate these problems. Because the strict rules of evidence do not apply to dispositional hearings, there are no assurances that the exhibits, even if considered at those hearings, were made available to the mother or her counsel. Neb. Rev. Stat. § 43-283 (Reissue 1984).

The Supreme Court of Iowa has previously set out safeguards for taking judicial notice of CHINA (child in need of assistance) proceedings in subsequent termination proceedings. *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980). The safeguards include:

> Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing.

Id. at 278. The purpose of these safeguards is to ensure a meaningful review. *Id.*

When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Parents in such proceedings have a right to cross-examine adverse witnesses. See, *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986); *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky. App. 1985); *In re Gary U.*, 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982). Cross-examination is a means of exercising the right of confrontation, the purpose of which is "to advance practical concern for the accuracy of the truth determination process . . . ." *State v. Roy*, 214 Neb. 204, 207, 333 N.W.2d 398, 401 (1983).

Where hearsay statements, such as those contained in the exhibits in this case, are admitted over objection without foundation evidence, opportunity to cross-examine the authors, or even any opportunity to view the exhibits prior to their offer at the termination hearing, there is little from which this court can ascertain the reliability or trustworthiness of the exhibits. By taking judicial notice of the exhibits in question, the juvenile court failed to accord the mother her due process right of cross-examination.

Further, the exhibits were clearly hearsay statements. Termination proceedings are subject to the customary rules of evidence applied in nonjury cases. Neb. Rev. Stat. § 43-279(1) (Reissue 1984). The record of the termination hearing does not contain the evidence necessary to justify admission of the exhibits under any exception to the hearsay rule. The guardian ad litem suggests the caseworker's and other reports were admissible under Neb. Rev. Stat. § 27-803(7) (Reissue 1985). However, the record reflects no evidence to satisfy the notice requirements of that section. The exhibits in question were

clearly hearsay and, on the record of this case, were inadmissible as exceptions to the hearsay rule or by way of judicial notice.

The concern for the child's confidentiality exhibited by the juvenile court, the State, and the guardian ad litem is understandable. But it must be remembered that rehabilitative efforts may fail following a § 43-247(3)(a) adjudication. The failure of such efforts may provide the basis for termination of parental rights, where termination is in the child's best interests. § 43-292(6). If the State wishes to rely on evidence from dispositional proceedings to support a termination based on failed efforts at rehabilitation, it must see that a verbatim record is made so that the testimony and other foundation evidence is preserved. Otherwise, it is not possible for this court to make a meaningful review of the proceeding. Separate juvenile courts are courts of record and are not free to shield their actions behind a cloak of secrecy by failing to make a verbatim record of the evidentiary proceedings before them. See Neb. Rev. Stat. § 43-2,111 (Reissue 1984).

In this particular case, any error in receiving the exhibits was not fatal to the juvenile court's determination that the mother's parental rights should be terminated. The court had before it other evidence, in the form of testimony and exhibits from the social file stipulated to by the mother's counsel, which is sufficient to sustain the order of termination.

A termination order is reviewed de novo, and evidence erroneously admitted is not considered. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987). Such an order must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative. *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987). Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay. *In re Interest of J.W., supra.*

As previously noted, the various orders entered pursuant to the dispositional hearings required the mother to abstain from the use of alcohol or controlled substances; participate in a Parents United program or its equivalent; participate in

counseling; pay the costs of her child's medical care and therapy; submit to chemical and psychological evaluations; complete a parenting program; submit to a home-study evaluation; obtain and maintain housing suitable for herself and her child; and maintain gainful employment. She was also ordered to have only supervised visitations with her child.

The record shows a lack of compliance by the mother with these orders in several areas.

In regard to the evaluations, the mother was ordered to submit to a chemical evaluation on April 18, 1985, and to an updated psychological evaluation on April 10, 1986. Ronda Newman, the Child Protective Services worker on the case, testified at the September 15, 1986, adjudication hearing that she had advised the mother in August of 1986 of the petition to terminate and of the mother's need to schedule the chemical and psychological evaluations. The mother had indicated that she would schedule the evaluations and, according to Newman, understood that her failure to do so might result in a termination of her parental rights. The mother never responded to Newman's requests that she make appointments for the evaluations and to notify the court workers as to where and with whom they were scheduled. Newman also testified that the mother knew how to contact Newman if she desired assistance.

As to participation in the Parents United program, Janet Guilfoyle, the child's therapist, testified that based on what she had learned through "monthly staffings," the mother's attendance was inconsistent.

In regard to counseling, the evidence indicates that the mother participated in counseling off and on from April 1984 to either June or August of 1986. In exhibit 7, a September 28, 1984, letter addressed to the juvenile probation officer, the mother's counselor in Florida indicated that parenting skills had been discussed in several sessions and that continued counseling on a regular basis would be beneficial if the mother was awarded custody of her child. On March 29, 1985, in a letter marked exhibit 15, the mother's Omaha counselor stated that "[t]here is a lot of work that needs to be done, so I do see [the mother] as having to be in therapy a considerable length of time before a judgement could be made as to her ability to

parent [her child] successfully."

In her own letter of September 24, 1985, the mother revealed that she was suffering from bulimia. The condition had been aggravated by worries about her daughter, finances, and employment. She indicated that she had begun to counsel with a Dr. Smith in Florida, in an attempt to regain her health. Ronda Newman testified she was unable to ascertain the extent of the mother's involvement in counseling with Dr. Smith, as the mother did not sign a release of her records until the records were subpoenaed by the State on August 18, 1986. Those records were not received in evidence for purposes of this adjudication. However, it is clear that the mother had terminated her counseling with Dr. Smith either prior to or during the pendency of the supplemental petition for termination filed on June 26, 1986.

In terms of supervised visitations, it is clear that the mother did participate in some visitations with her daughter when she (the mother) was in Omaha. The child was originally fearful of the visitations. That fear diminished to some extent over time, but Janet Guilfoyle testified that there had not been much change in the quality of the mother's visits with the child. Also, there had been some problems in terms of the child's behavior during and following the visits. Repeated recommendations made to improve their interactions were not utilized by the mother.

The record shows that the mother resided in Florida from at least April to November of 1984. In November 1984, she returned to Omaha. The mother returned to Florida in June of 1985 for health and financial reasons. She did not attend the September 15, 1986, termination hearing.

Janet Guilfoyle testified that if the goal of juvenile proceedings and rehabilitative efforts is reunification, as was the case here, it is almost essential that the parent reside in the area so that the parent can have ongoing contact with the child. Once the mother returned to Florida in June of 1985, there was minimal correspondence between her and her daughter. Prior to the mother's brief stay in Omaha and her subsequent return to Florida, her Florida counselor indicated that it was difficult to emphasize any particular parenting skills with the mother due

to lack of contact with the child.

The mother complains that the termination of her parental rights is, in essence, punishment for her moving to Florida, which allowed her to improve her life. The evidence, however, is clear that the move did not serve to better her relationship with her child. There was little communication or contact subsequent to the move, which the testimony indicates was necessary for successful reunification. A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation. *In re Interest of Moen*, 208 Neb. 337, 303 N.W.2d 303 (1981).

Further, the fact of participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987). In addition to the obstacles to reunification presented by the mother's move to Florida, there is evidence that she has not adequately dealt with her problems in regard to her abuse of her daughter. Her child was originally referred to Janet Guilfoyle because of past abuse by several people, including the mother. In 1984, the mother admitted to her Florida counselor that she had been guilty of abusing her daughter. She made similar admissions to her Nebraska counselor, but denied all but a few instances subsequent to her child's reaching age 1. She also has denied allegations by her child of sexual abuse. In an April 1985 report to the court, the Child Protective Services worker reported that the mother had been fluctuating between admitting and denying any physical abuse of her daughter. Janet Guilfoyle also testified that the mother failed to ever address the allegations of sexual abuse. Additionally, there is evidence that the mother failed to follow recommendations for improving her interactions with her daughter during supervised visitations. Clearly, the evidence shows not only a substantial lack of compliance with the plan but also a lack of progress.

The evidence also supports the determination that it is in the child's best interests to terminate the mother's parental rights. According to Janet Guilfoyle, the child has made great progress in therapy. Nevertheless, it was Guilfoyle's opinion that the child still exhibited some behaviors of an abused child and that, at 10 years of age, she was in crucial need of a permanent placement. Further, Guilfoyle testified that the placement should be in a situation where the child would receive a lot of consistent parenting, nurturing, and stability.

The mother's on-again, off-again relationship with her child has failed to provide the necessary consistency or stability. At one point prior to the mother's departure for Florida in June of 1985, her child indicated that she had four last names, including that of her foster parents and that of her mother. When the mother subsequently left Nebraska, her child was very angry and disappointed.

Combined with the above, evidence of the mother's progress and compliance shows that she will not provide the necessary parental skills and guidance to her child. The mother's lack of contact with her child, her need for long-term counseling, the fact that she had ended counseling at the time of the termination hearing, and her own needs for proper nurturing are all circumstances supporting the juvenile court's determination that it was in the child's best interests to terminate the mother's parental rights.

As we have frequently stated, a child's future need not be subject to the risks of awaiting uncertain parental maturity. *In re Interest of C.G.C.S., supra.* Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home. *In re Interest of P.F.*, 222 Neb. 44, 381 N.W.2d 921 (1986).

The child has been a ward of the State since August of 1983. The mother had not had custody of her child for some 2 years prior to that time. After 3 years of rehabilitative efforts the evidence supports the need for permanent placement of the child and shows a lack of rehabilitation by the mother. The court properly entered its order of termination.

Finally, the mother claims that the order of termination was contrary to law because the conditions leading to the

determination that her child was a child within the meaning of § 43-247(3)(a) had nothing to do with her. Thus, she concludes that her parental rights could not be terminated on grounds that reasonable efforts had failed to correct the conditions leading to the determination that her child was a child within the meaning of § 43-247(3)(a). We do not agree.

The fact of the matter is that at the time of the original adjudication, the mother had twice relinquished custody of her child to the father following their divorce. The mother relinquished custody when she went into the Army and, upon leaving the service, returned to Florida to live with her parents instead of returning to her daughter, who was then in the custody of the State. Certainly, the mother's unavailability as a custodial parent at the time of the original adjudication was a condition leading to the determination that the child was "without proper support through no one's fault."

We conclude that the separate juvenile court's order terminating the mother's parental rights is supported by the evidence and was not contrary to law. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. SCHRECK, JR., APPELLANT.

409 N.W.2d 624

Filed July 31, 1987. No. 86-1013.

1. **Plea in Abatement: Appeal and Error.** Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
2. **Criminal Law: Intent.** Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
3. **Convictions: Appeal and Error.** It is not the province of this court on appeal of a conviction to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must

be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

4. **Constitutional Law: Appeal and Error.** In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
5. **Constitutional Law: Criminal Law: Statutes.** In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
6. _____: _____: _____. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
7. _____: _____: _____. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
8. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal, in the absence of an abuse of discretion by the sentencing court.
9. **Sentences: Evidence.** In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant.
10. _____: _____. The seriousness of the offense is an important factor in imposing a sentence.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Richard L. Kuhlman, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a trial by jury the defendant was convicted of the May 26, 1986, assault in the first degree of Richard A. Porter III in Dodge County. This is a Class III felony under the provisions of Neb. Rev. Stat. § 28-308 (Reissue 1985), which provides for a penalty of from 1 to 20 years' imprisonment, or a $25,000 fine, or both such imprisonment and fine. Following a presentence investigation and sentencing hearing, defendant was sentenced to a term of imprisonment of not less than 5 nor more than 12 years.

Defendant has appealed, and the errors assigned and argued in his brief are (1) the court erred in not sustaining his amended

plea in abatement; (2) the court erred in failing to find the statute under which defendant was charged to be unconstitutionally vague, or, in the alternative, the State failed to prove beyond a reasonable doubt that defendant had violated the statute; and (3) the sentence was excessive.

It is defendant's contention that the preliminary hearing failed to produce facts that a crime had been committed. However, we have repeatedly held that any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986).

There was competent evidence from which the jury could properly have found beyond a reasonable doubt that defendant, without any cause, deliberately went over to the automobile in which the victim was sitting, forced open the door, and, as the victim started to get out of the vehicle, defendant slammed the door on him, pinning the victim between the door and the doorframe. Defendant then viciously struck the victim four times in the jaw, causing a fracture of the arch of the jaw.

The victim testified that he suffered extreme pain as a result of the assault and had to have an operation to wire the arch of the jaw and to place a metal disk on his face. He was hospitalized for 5 days. According to the examining physician, the victim sustained a depressed fracture of the zygoma, or cheekbone. An open reduction of the fracture was performed, which was necessary to prevent a serious permanent disfigurement.

Section 28-308 provides that a person commits assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. Neb. Rev. Stat. § 28-109(20) (Reissue 1985) defines serious bodily injury as "bodily injury which involves a substantial . . . risk of serious permanent disfigurement . . . ." Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987).

Although there was testimony to the contrary, there was sufficient evidence from which the jury properly could have found, as it did, that defendant intentionally or knowingly caused bodily injury to the victim which involved a substantial risk of serious permanent disfigurement. It is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Eggers*, 220 Neb. 862, 374 N.W.2d 36 (1985). See, also, *State v. Tweedy, supra*. Having determined that the evidence was sufficient to permit the jury to find guilt beyond a reasonable doubt, there is no merit to defendant's contention that his plea in abatement was wrongfully denied.

Defendant's challenge of § 28-308 as being vague must also fail. In the first place, defendant did not raise the constitutional issue in the district court. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived. *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984). Secondly, in order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Such factor is not present here.

Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute. *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Furthermore, where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more. *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983). See, also, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). The language of § 28-308 clearly is not vague.

Finally, defendant complains of the excessiveness of the

sentence. A sentence imposed within statutory limits will not be disturbed on appeal, in the absence of an abuse of discretion by the sentencing court. *State v. Tweedy, supra.* In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). In this regard, defendant has demonstrated a serious disposition toward antisocial behavior for almost the past 10 years. He has been convicted of two previous felonies for which, in each instance, he was sentenced to a term of imprisonment; he has engaged in prior assaultive behavior which resulted in a term of incarceration; he has been fined or jailed for forgeries, thefts, and bad checks; and he has been found guilty of numerous traffic offenses, including six cases involving driving while his license was suspended, which resulted in jail terms. His actions have demonstrated a total disregard for the law and ordinary rules of social behavior. The crime was a serious one resulting in substantial injury. The seriousness of the offense is an important factor in imposing a sentence. *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984).

The sentence in this case was not excessive, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. PUBLIC EMPLOYEES RETIREMENT BOARD ET AL., RESPONDENTS.

410 N.W.2d 463

Filed August 7, 1987. No. 86-819.

1. **Constitutional Law: Statutes.** Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
2. _____: _____. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
3. **Constitutional Law: Courts.** Courts must apply and must enforce the Constitution as it is written.

4. **Constitutional Law.** Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary.
5. _____. If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction.
6. **Constitutional Law: Initiative and Referendum: Intent.** The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
7. **Constitutional Law: Statutes: Legislature.** L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.

Original action. Judgment for relator.

Robert M. Spire, Attorney General, and L. Jay Bartel, for relator.

Steven E. Achelpohl of Schumacher & Gilroy, for respondents.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is a declaratory judgment action, brought by the Attorney General of the State of Nebraska, as relator for the State of Nebraska, challenging the constitutionality of 1986 Neb. Laws, L.B. 1129, passed by the Nebraska Legislature on April 16, 1986, over the veto of then Governor Robert Kerrey. Respondents are public officers delegated duties to implement the law, including then Treasurer, now Governor, Kay Orr. Because this is a civil action in which the State is a party and because this action involves a matter relating to the revenue of the State, is of great public importance, requires a prompt answer, and does not involve any disputed questions of fact, we granted authority to the Attorney General to file an original action in the Supreme Court pursuant to Neb. Const. art. V, § 2, and the provisions of Neb. Rev. Stat. § 24-204 (Reissue 1985).

We have now reviewed the law in question, considered the arguments of the parties, and examined the applicable authorities. We are of the opinion that L.B. 1129 is in

contravention of the provisions of Neb. Const. art. III, § 7, and as such must be declared invalid and unenforceable.

L.B. 1129, which consists of 20 specific sections, attempts to create a pension program to provide retirement benefits to members of the Nebraska Legislature. Section 3 of the law establishes a retirement system to be known as the Legislators' Retirement System. Section 5 provides that the system is to be administered by the Public Employees Retirement Board, and § 9 creates a fund known as the Legislators' Retirement Fund. Under provisions of § 12 of the act, a member of the Legislature is eligible for a retirement allowance, upon his or her written application, if he or she has attained the age of 65, has completed 5 or more years of "creditable service," and is no longer a member of the Legislature. "Creditable service" is defined under the provisions of § 4 of the act to mean "all years of service in the Legislature for any person who becomes a member of the system." The act further provides that upon retirement eligible members shall receive a monthly allowance equal to $38 times the number of years of his or her creditable service, subject to certain other limitations set out in the act. Finally, § 20 provides for an appropriation of $177,500 for the period of July 1, 1986, to June 30, 1987, for payment into the Legislators' Retirement Fund.

Each side cites us to a series of legal principles to be used when attempting to examine the constitutionality of a legislative act. We are reminded that statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality. *State v. Mayhew Products Corp.*, 211 Neb. 300, 318 N.W.2d 280 (1982). The party challenging the constitutionality of a statute has the burden to show it is unconstitutional. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). Courts must apply and must enforce the Constitution as it is written, *State ex rel. Meyer v. Steen*, 183 Neb. 297, 160 N.W.2d 164 (1968), and constitutional provisions are not open to construction as a matter of course, *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary. *State ex*

rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N.W.2d 538 (1959). If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction. *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980). The language of the Constitution is to be interpreted with reference to established laws, usages, and customs of the country at the time of its adoption, *State ex rel. Caldwell v. Peterson,* 153 Neb. 402, 45 N.W.2d 122 (1950), and *State v. Sheldon,* 78 Neb. 552, 111 N.W. 372 (1907); yet the terms and provisions of the Constitution "are constantly expanded and enlarged by construction to meet the advancing affairs of men." *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 338, 37 N.W.2d 502, 506 (1949).

We turn first to the specific language of the Constitution which the Attorney General maintains invalidates the provisions of L.B. 1129. It is a section which we have had occasion in recent times to examine. See *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984). Specifically, the language in question is found in Neb. Const. art. III, § 7, and reads in relevant part as follows:

> Each member of the Legislature shall receive a salary of *not to exceed* four hundred dollars per month during the term of his office. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular and special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses . . . .

(Emphasis supplied.)

The question, simply stated, is: Does the granting of a retirement benefit to members of the Legislature constitute either "pay" or a "perquisite" otherwise prohibited by the provisions of Neb. Const. art. III, § 7?

While presented to us in a slightly different context, we did have an occasion to define the terms "pay" and "perquisite" in *State ex rel. Douglas v. Beermann, supra* at 854-55, 347 N.W.2d

at 301-02, where we said:

> Webster's Third New International Dictionary, Unabridged (1968), tells us that "pay," as a noun, in an archaic sense, means "something given in return by way of reward or retaliation"; that it is wages, salary, or remuneration. Black's Law Dictionary 1016 (5th ed. 1979) defines the noun "pay" as meaning compensation, wages, salary, commissions, or fees. . . .
>
> "Perquisite" is defined in Webster's Third New International Dictionary, Unabridged (1968), as casual income or profits; a privilege, gain, or profit incidental to an employment in addition to regular salary or wages; a gratuity or tip; something held or claimed as an exclusive right or possession. Black's Law Dictionary 1027 (5th ed. 1979) defines the word as meaning emoluments, fringe benefits, or other incidental profits or benefits attaching to an office or position. We have previously, in *State v. Sheldon*, 78 Neb. 552, 111 N.W. 372 (1907), defined perquisite as a gain or profit incidentally made from employment in addition to regular salary or wages. In that case we held that a residence provided by the state for occupancy by the Governor, at the place he was required by law to live, was not a "perquisite" within the meaning of a constitutional provision that the Governor might not receive any "perquisites of office or other compensation" in addition to his salary. We concluded that perquisite meant a compensation or reward for the performance of an official duty. [Citations omitted.]

We concluded in *State ex rel. Douglas v. Beermann, supra* at 855-56, 347 N.W.2d at 302, by saying:

> Therefore, the first 14 words of the third sentence of the constitutional provision in question, "Members of the Legislature shall receive no pay nor perquisites other than said salary," given their most natural and obvious meaning, say that Nebraska's legislators shall receive no wages, remuneration, compensation, fees, profit, or gain incidental to their office other than the salary mandated in the first sentence of the section.

We concluded that by reason of the provisions of Neb.

Const. art. III, § 7, a legislator could only receive $400 per month by way of salary and be reimbursed for expenses actually incurred in the performance of the legislator's official duties. In view of the fact that the moneys to be reimbursed to the legislator in the performance of official duties for expenses incurred were to be equal to and not in excess of actual moneys paid or incurred by the legislator for and on behalf of the State, the legislator would not be receiving more than $400 per month as salary, plus the return of moneys actually expended on behalf of the State of Nebraska in the performance of official duties.

We are unable to conceive how a retirement benefit awarded a former legislator for "creditable service" can be said not to be within one of the many meanings of either "pay" or "perquisites." Certainly the Legislature could not be making a gift of state money to its former members. The benefit can be nothing other than compensation for past services. Indeed, we have previously held that public employee retirement benefits or pensions constitute deferred compensation for services rendered. *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982); *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964); *Wilson v. Marsh*, 162 Neb. 237, 75 N.W.2d 723 (1956).

Respondents point to decisions from other jurisdictions which they claim hold to the contrary. As we earlier indicated in *State ex rel. Douglas v. Beermann, supra*, relying on other decisions by other courts which in turn relied upon provisions of other constitutions serves little purpose in determining the meaning of our own specific Constitution.

Nonetheless, a careful analysis of the decisions upon which the respondents rely establishes that they differ from the situation presented by this case. *Knight v. Bd. etc. Employees' Retirement*, 32 Cal. 2d 400, 196 P.2d 547 (1948), reasoned that state legislators were state employees, and a constitutional provision specifically empowering the legislature to provide for the " 'payment of retirement salaries to employees of the State' " modified the constitutional prohibition against legislators' receiving any " 'compensation for their services other than that fixed by the Constitution.' " *Id.* at 401-02, 196

P.2d at 548. Even if Nebraska's legislators are employees of the state, a question not before us and thus not decided, there is no Nebraska constitutional provision which modifies its prohibition against paying our legislators any "pay" or "perquisites" other than the specified salary and expenses.

Boryszewski v Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579 (1975), conforms with our analysis by concluding that a pension benefit was compensation earned during a legislator's " 'continuance in office,' " and thus did not violate a constitutional provision prohibiting the receipt of any " 'fees or perquisites of office or other compensation' " except the compensation " 'fixed by law' " to be paid " 'during [a legislator's] continuance in office.' " *Id.* at 366, 372 N.Y.S.2d at 628, 334 N.E.2d at 582-83. *Chamber of Commerce E. Union Cty. v. Leone*, 141 N.J. Super. 114, 357 A.2d 311 (1976), *aff'd on appeal* 75 N.J. 319, 382 A.2d 381 (1978), essentially presented the same problem as faced the *Boryszewski* court. Using the same rationale as did *Boryszewski*, the *Leone* court permitted the payment of retirement benefits.

State ex rel. Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938), has no relevance to our inquiry. Therein, the Constitution provided that a legislator could not be elected to any office " 'the emoluments of which shall have been increased, during the term for which he was elected.' " *Id.* at 148, 82 P.2d at 174. The *Reeves* court held that the adoption of a retirement plan for judges was not an "emolument"; thus, one who had been a legislator when the plan was adopted could seek election as a judge. In so ruling, the court said the word "emolument" implied actual pecuniary gain, rather than some imponderable and contingent benefit. There is nothing imponderable and contingent about paying a specified monthly allowance such as is contemplated by the plan before us. It should also be noted that the *Reeves* court specifically avoided deciding whether the retirement plan was a pension, adjusted or deferred compensation, or insurance.

The West Virginia Constitution prohibited paying legislators any "allowance or emolument" other than the salary and expenses specified in the Constitution. Yet *Campbell v. Kelly*,

202 S.E.2d 369 (W. Va. 1974), held that the legislators' pension system constituted neither an "allowance" nor "emolument." In reaching that determination, the *Campbell* court noted it was dealing with language adopted in 1872, at which time 64 percent of the adult labor force was engaged in agriculture, there were no state pension plans in the country, and private pension plans were very rare. The *Campbell* court thus concluded that pension plans could not have been within the contemplation of the framers of the Constitution. The obvious distinction is that we are not dealing with 1872 language. Although it is true the Nebraska language prohibiting legislators from receiving any "pay" or "perquisites" other than the sums otherwise specified predated the 1934 initiative, and first appeared in Neb. Const. art. III, § 4 (1875), the fact remains that such language was retained in 1934. The relevant date therefore is 1934, and the record is silent as to the situation which then prevailed with respect to pension plans. More fundamentally, the rationale used by the *Campbell* court overlooks that, irrespective of whether the 1872 framers of the West Virginia Constitution contemplated pensions, they clearly stated that legislators were to receive nothing other than the sums specified in the Constitution. The *Campbell* court simply ignored that direction. Moreover, this jurisdiction is committed to the rule that the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself, because there is no meaningful way to determine the motivations for submitting the initiative to the electorate or to determine the intent of those voting for its enactment. *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986).

Nor does the fact that the Legislature has chosen to declare the act constitutional in its preamble alter the true nature of the act. It is true that if the purpose of the act is unclear and the Legislature declares a public purpose which is not invalid on its face, a court will give strong consideration to the intent of the Legislature. See *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Yet, if the act is clearly contrary to the Constitution, it is for the courts to make that decision, regardless of the proclaimed legislative

intent. See *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). Such is the instant case.

Respondents have very properly and accurately described the great inequity our decision will bring about. Respondents specifically call our attention to the fact that under the current salary limitations members of the Nebraska Legislature are generally unable to save for old age security and, further, unable to earn credit in an alternate plan where they work because of their legislative duties. We are advised by respondents that, should we declare L.B. 1129 invalid, Nebraska's will be but one of only seven state legislatures which do not have pension programs for their members. While all of this is true and a fact which the people of the State of Nebraska should consider, it is not a basis upon which a court may ignore, nor amend, the provisions of the state's Constitution. Our function is to adhere to the Constitution, regardless of the inequities that may result.

L.B. 1129, adopted by the Legislature on April 16, 1986, is hereby declared to be invalid and unenforceable, and the respondents, and each of them, are hereby enjoined from performing any of the duties or obligations required thereunder.

JUDGMENT FOR RELATOR.

STATE OF NEBRASKA, APPELLEE, V. SAM JACOBS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. RYAN JACOBS, APPELLANT.
410 N.W.2d 468

Filed August 7, 1987. Nos. 86-854, 86-855.

1. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
2. **Venue: Appeal and Error.** A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
3. _____: _____. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity

make it impossible to secure a fair trial.

4. **Venue: Juries.** To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
5. **Venue.** The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
6. **Juror Qualifications.** A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
7. _____. Under the provisions of Neb. Rev. Stat. § 25-1636 (Reissue 1985), it is not a "cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement."
8. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
9. **Rules of Evidence.** Under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985), relevant evidence is to be excluded if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.
10. **Evidence: Other Acts.** Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
11. **Motions for Mistrial: Appeal and Error.** The determination to declare a mistrial is a matter entrusted to the sound discretion of a trial court, whose ruling will be upheld absent an abuse of that discretion.
12. **Motions for Mistrial.** A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
13. **Criminal Law: Evidence: Proof.** To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
14. **Convictions: Appeal and Error.** In determining whether evidence is sufficient in a jury trial to sustain a conviction, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury.
15. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the

evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.

16. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt; the State is not required to disprove every hypothesis but that of guilt.
17. **Trial: Evidence: Motions to Dismiss: Appeal and Error.** Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Affirmed.

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellants.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

A jury found defendant-appellant Sam Jacobs guilty of arson in the second degree in violation of Neb. Rev. Stat. § 28-503 (Reissue 1985), and of criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Reissue 1985). The same jury found Sam Jacobs' son, defendant-appellant Ryan Jacobs, guilty of second degree arson. In accordance with the jury's verdicts, the district court adjudged each defendant guilty and sentenced Sam Jacobs to probation for a period of 3 years on the arson conviction and imposed a $250 fine on the criminal mischief conviction. Ryan Jacobs was sentenced to 3 years' probation. On appeal to this court each defendant assigns as errors the trial court's (1) failure to sustain the plea in abatement made by each defendant, (2) failure to grant a change of venue to each defendant, (3) admission of testimony concerning Sam Jacobs' prior conduct, (4) failure to grant a mistrial, and (5) failure to find the evidence insufficient to support the jury's findings of guilt. We affirm.

On Friday evening, August 2, 1985, Sam Jacobs got into a fight with Clinton Wreszinski and Kevin Lukasiewicz. Sam

Jacobs sustained some facial cuts, was treated at a hospital, and wanted charges brought against Wreszinski and Lukasiewicz. William Steele, a policeman for the city of St. Paul, located in Howard County, told Sam Jacobs that after the police finished gathering information on the fight, they would turn the matter over to the county attorney, who would decide if there was a basis upon which to press charges.

Lukasiewicz was a close friend of Scott and Ricky Klinginsmith and lived with their brother, Steve Klinginsmith. Ricky Klinginsmith owned a mobile home located in Howard County and lived there with Jeff Nowak. The mobile home was located 2.9 miles from Sam Jacobs' hog farm, a distance which could be traveled in 4 minutes and 15 seconds if the driver remained within the posted speed limits. Scott Klinginsmith lived with his parents, but Ricky Klinginsmith had given Scott permission to stay at the mobile home with Nowak while Ricky was in Minnesota.

On Saturday, August 3, 1985, Scott Klinginsmith and Nowak left the mobile home around 9 p.m. Because they did not have a key, they did not lock the front door. They drove Nowak's pickup truck and left Scott Klinginsmith's 1973 maroon Pontiac Grand Prix parked about 40 yards away.

Lukasiewicz owned a 1977 Pontiac Grand Prix which also was maroon and which Sam Jacobs knew Lukasiewicz had been driving on the night of the fight. The Lukasiewicz and Klinginsmith vehicles were of the same body style but perhaps differed in the configuration of the headlights, grill, and taillights. In addition, the Lukasiewicz automobile, unlike the Klinginsmith automobile, had a removable glass roof. The Lukasiewicz automobile displayed an "in transit" sticker.

According to his girlfriend, Ryan Jacobs left her house because of a telephone call he received around 9:15 p.m. that Saturday from his mother. Sam Jacobs wanted Ryan Jacobs home "because of the incidents that happened Friday night." When Ryan Jacobs arrived at home, Sam Jacobs asked him to change his clothes, purportedly to go burn musk thistles and shoot rats. Sam and Ryan Jacobs then left in the pickup truck with a rifle and a 4- to 5-gallon can filled with a mixture of diesel fuel and gasoline. A short while later, at 9:45 p.m., Ricky

Klinginsmith's mobile home was reported to be on fire. About 10 minutes after that, Ryan Jacobs was reported to be the victim of severe burns at the Jacobs' farm.

Additionally, Scott Klinginsmith's 1973 maroon Pontiac Grand Prix was found with a smashed windshield and driver's side window. Some blood was found on the driver's side rearview mirror.

Somewhere between 1:45 and 2 a.m., a few hours after the fire, Sheriff Bryer and others were at Sam Jacobs' farm, where Sam Jacobs took them out to a garbage or fire pit. This pit was an earthen hole about 4 feet by 10 feet and about 4 feet deep, which was used for burning garbage. Sam Jacobs told the sheriff that at about 9 p.m., Ryan Jacobs had dumped 4 or 5 gallons of gasoline-diesel fuel mixture into the pit, ignited it, and then fell into the pit at its east wall and came out on the same side. Sam Jacobs said he himself was burned while helping Ryan Jacobs out of the pit. According to Sam Jacobs, he rolled Ryan Jacobs in some grass or weeds near the pit in an effort to extinguish the flames, and he had ripped off Ryan Jacobs' clothes and then threw them into the pit.

Robert Burke, a deputy State Fire Marshal, was of the opinion that there had not been a recent fire in the pit because fresh paper, paper bags, Kleenex, and dried weeds were found on top of the ashes and debris left by a previous fire.

The St. Paul chief of police was also of the opinion that there had been no recent burning in the pit because of the dry grass, paper bags, and tissue paper found on top of old burnings.

The sheriff was also satisfied that there had not been any recent fire in the pit because he found no scuff marks on the wall where Ryan Jacobs was supposed to have come out from the pit, and found no smoke stains or anything that would indicate the intense heat that would radiate from 4 to 5 gallons of gasoline and diesel fuel.

An examination of the grass surrounding the pit showed it was still standing, and it appeared that no one had been rolled in it.

Sam Jacobs later changed his story about which side of the pit Ryan Jacobs was supposed to have fallen into. He also changed his story about the clothes Ryan Jacobs was wearing.

He had earlier said that he pulled off Ryan Jacobs' clothes and threw them into the pit, where they supposedly burned. However, after a search of the pit revealed no trace of any clothing, Sam Jacobs produced a cardboard box of laundered clothes which revealed no signs of having been burned.

The sheriff returned to the pit on August 5, where he took pictures and traced the path that Sam Jacobs said Ryan Jacobs had walked. It was a very difficult walk through the pit, and he left deep impressions, having sunk about halfway up to his knees. Although Sam Jacobs told the sheriff that the pit was in the same condition as the night of the fire, no similar impressions had been observed before.

Meanwhile, the deputy State Fire Marshal had concluded that the mobile home fire was set by a flammable liquid's having been poured onto the floor just inside the unlocked front door and then ignited.

The origin of the blood on the rearview mirror of the Klinginsmith automobile could not be precisely determined; however, laboratory tests did not rule out Sam Jacobs, who had a cut on an arm after the fire, as a possible source. He claimed both that he got the cut in the Friday night fight and that it had to come from something "like a hog panel wire" he brushed off of Ryan Jacobs' pants when rolling his son on the ground. However, a nurse who examined him at the hospital after the Friday night fight said the cut did not exist at that time.

Sam and Ryan Jacobs first assign as error the refusal of the district court to grant their respective pleas in abatement, in that there was no evidence at the preliminary hearing that a crime had in fact been committed, no competent testimony as to the cause of the fire, no evidence to place the defendants in the area of the fire, and no evidence of "any circumstantial nexus between the fire" and their conduct. The controlling principle is that any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence. *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Baker,* 224 Neb. 130, 395 N.W.2d 766 (1986); *State v. West,* 223 Neb. 241, 388 N.W.2d 823 (1986). The issue is thus whether the evidence was sufficient to support the conviction. *State v. Baker, supra.*

Accordingly, resolution of this issue depends on the outcome of the fifth and last assignment of error, which challenges the sufficiency of the evidence. Thus, we need say nothing more about the matter at this point.

In connection with their second assignment of error, the defendants urge that the trial court erred in not granting their respective motions to change venue.

A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985), which permits such when it appears "that a fair and impartial trial cannot be had" in the county where the offense was committed, is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern,* 224 Neb. 177, 397 N.W.2d 23 (1986). A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. Kern, supra; State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986). To secure a change of venue on the basis of pretrial publicity, the defendant must show that publicity has made it impossible to secure a fair and impartial jury. *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Bird Head, supra; State v. Kern, supra; State v. Heathman, supra; State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976). The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *Irvin v. Dowd*, 366 U.S. 717, 81 S.

Ct. 1639, 6 L. Ed. 2d 751 (1961); *State v. Bird Head, supra; State v. Kern, supra; State v. Heathman, supra; State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Torrence*, 192 Neb. 213, 219 N.W.2d 772 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). Indeed, Neb. Rev. Stat. § 25-1636 (Reissue 1985) specifically provides that it shall not be a

> cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement . . . .

In an effort to establish that a fair trial could not be had in Howard County, Sam Jacobs' wife, in a single day and within 4 working days of the scheduled trial, obtained the signature of 52 Howard County residents to affidavits containing the conclusion that Sam Jacobs could not obtain a fair and impartial trial because "many residents of Howard County have formed an opinion concerning the contents of the case which is prejudicial" to him. The affiants did not report their own state of mind but in some unexplained way purported to divine the state of mind of other Howard County residents.

Be that as it may, the record reflects that a local area newspaper initially reported on August 7, 1985, the fact that there had been two fires in Howard County which were suspected to have been deliberately set, one early Friday morning and another Saturday evening. A separate, unrelated article in the same paper reported that an ambulance call had been made for Ryan Jacobs at the Sam Jacobs home. Later news articles factually reported that Sam Jacobs and Ryan Jacobs had each been charged with criminal mischief and arson and that the Howard County commissioners had adopted a resolution appointing a special prosecutor to assist the county attorney in the cases.

Many of the 75 venirepersons, which total included three talespersons, had heard rumors about the cases. As a consequence, approximately 40 percent of 75 venirepersons

were excused by the court because they said they could not be fair and impartial. Nonetheless, in a little more than a day a jury was empaneled and an alternate selected with the exercise of but a single challenge for cause on the basis that one venirewoman could not be impartial. The court sustained the challenge because the woman had signed one of the affidavits mentioned earlier and after some vacillation reasserted she thought the trial should have been moved, although she had not made up her own mind "either way."

Under the circumstances, there was no abuse of discretion in refusing a change of venue, and there is therefore no merit to this assignment.

In their third assignment of error, the Jacobses urge the trial court erred by admitting evidence of the Friday night fight. Their claim is that such evidence was not relevant and was unduly prejudicial to them.

The language of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive." *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Clancy,* 224 Neb. 492, 398 N.W.2d 710 (1987). Nonetheless, Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.

Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

The attempt to explain how Ryan Jacobs came to be burned made relevant the question of whether the Jacobses had a motive to set fire to a mobile home near which there was parked an automobile which could have been mistaken for one seen in Lukasiewicz' possession and which had obviously been deliberately damaged. Under the circumstances, we cannot say the trial court abused its discretion in weighing the need for the questioned evidence as proof of motive against the danger of

prejudice to Sam and Ryan Jacobs and striking the balance in favor of admissibility. There is therefore no merit to this assignment.

The fourth assignment of error claims the trial court erred in not granting Sam and Ryan Jacobs' motions for mistrial "resulting from improper questioning by the prosecuting attorney and prejudicial and improper responses by a witness."

It is true that the sheriff demonstrated a remarkable inability, or unwillingness, to focus upon and limit his responses to the questions asked of him. However, the questions themselves were not improper, and there is no showing that the prosecutor was somehow responsible for the sheriff's wanderings. Moreover, upon the Jacobses' objection, the trial court instructed the jury to disregard the responses. Most importantly, the responses were cut off before any prejudicial statements were made.

The determination to declare a mistrial is a matter entrusted to the sound discretion of a trial court, whose ruling will be upheld absent an abuse of that discretion. *State v. Nesbitt, supra; State v. Clancy, supra.* A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. *State v. Clancy, supra; State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

The record fails completely to establish such event. Consequently, the assignment is utterly without merit.

In their ultimate assignment, Sam and Ryan Jacobs argue that the evidence is insufficient to support their convictions and that the trial court thus erred in failing to sustain their respective motions for dismissal.

The thrust of this argument, and of the defense relied upon at trial, is that neither Sam nor Ryan Jacobs could be guilty as charged because each proved an alibi; that is, according to them, each proved he was at Sam Jacobs' fire pit at the relevant time and thus could not have been at the scene of the crimes.

To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty

party. See, *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *Commonwealth v. Warrington*, 230 Pa. Super. 332, 326 A.2d 427 (1974).

The mobile home and damaged automobile were located but a brief span of time away from Sam Jacobs' home. Although the Jacobses claimed Ryan Jacobs was burned in the fire pit and rolled on the grass surrounding it to extinguish the flames, there were photographs of dry, unburned paper and other debris in the pit, and testimony from which the jury could reasonably conclude there in fact had been no recent fire in the pit and that no one had been rolled in the grass around it. Thus, the jury could reasonably conclude the Jacobses were not where they said they were at the time the crimes were committed. That, coupled with the evidence of the Jacobses' motive for revenge against Lukasiewicz, the presence at the scene of the fire of an automobile which could be mistaken for one seen in Lukasiewicz' possession, and the fact that the mobile home fire showed the presence of an accelerant, is adequate to support the jury's verdicts and the judgments entered pursuant thereto.

As we have so often said, in determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Walker,* 225 Neb. 794, 408 N.W.2d 294 (1987); *State v. El-Tabech, supra.* Moreover, one accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Nesbitt, supra; State v. Bird Head, supra; State v. El-Tabech, supra.* In a prosecution in which the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant, denial of the defendant's motion to dismiss is without error. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986).

The record failing to sustain the errors assigned, the judgments of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AGINALDO ALVARADO, SR., APPELLANT.
410 N.W.2d 118

Filed August 7, 1987. No. 86-998.

1. **Motions for Mistrial: Appeal and Error.** A motion for a mistrial is addressed to the sound discretion of the trial court, whose ruling will not be reversed on appeal in the absence of an abuse of that discretion.
2. **Juries: Discrimination: Proof: Prosecuting Attorneys.** A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
3. _____: _____: _____: _____. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
4. **Trial: Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
5. **Trial: Juries: Discrimination: Proof: Prosecuting Attorneys.** The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert L. Gridley of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant, Aginaldo Alvarado, Sr., was charged by information with (1) assault on a peace officer, (2) resisting arrest, and (3) obstructing a peace officer. He pleaded not guilty to all three counts.

On October 27, 1986, the case came on for jury selection. Twenty-four prospective jurors were examined on voir dire by the court and counsel for both parties. Both the State and defense counsel passed the jury for cause. Each party then exercised peremptory challenges. The State's third and fifth strikes, respectively, were Thomas Patton, referred to in the record as an "Indian," and Ignacia Diaz, a "Mexican American."

At the conclusion of the peremptory challenges, defense counsel moved for a mistrial, claiming that the State had illegally used its peremptory challenges to systematically strike minorities from the jury. The State responded that it had legitimate reasons for striking both Patton and Diaz from the jury. The court found no systematic discrimination under the circumstances and overruled the motion for a mistrial.

After trial to the jury, the defendant was found guilty of all three counts.

On November 5, 1986, Alvarado filed a motion for new trial, claiming, inter alia, that the trial court had erroneously overruled his motion for a mistrial. Alvarado argued that under *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the State's striking of Diaz by way of peremptory challenge established a prima facie case of purposeful discrimination which the State had failed to rebut. The prosecutor responded that he would stand on his previously stated reasons for excluding both Patton and Diaz.

The trial court overruled the motion for new trial on all grounds after determining that under *Batson, supra,* 1 strike out of 24 jurors could not serve to establish a case of purposeful discrimination. Alvarado was subsequently sentenced to imprisonment for 15 months on count I and to 6 months each on counts II and III, all sentences to run concurrently, and with credit for 7 days in jail.

On appeal, Alvarado contends the trial court erred in: (1)

failing to sustain his motion for mistrial; (2) failing to sustain his motion for new trial; and (3) failing to uphold his constitutional rights as guaranteed by the equal protection clause of the 14th amendment to the U.S. Constitution, as interpreted and applied by the Court in *Batson v. Kentucky, supra.*

Recently, in *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987), this court applied the guidelines set out in *Batson v. Kentucky, supra*, to determine whether the State had purposefully discriminated on the basis of race by using its peremptory challenges to strike all black members from a jury panel. In *Batson, supra*, the Court held that a black defendant is denied equal protection of the law when the State puts him on trial before a jury from which members of his race have been purposefully excluded. It also held that a defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges at the defendant's trial.

According to *Batson, supra* at 96, to establish such a prima facie case

> the defendant first must show that he is a member of a cognizable racial group [citation omitted] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [Citation omitted.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Once a prima facie case has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. *Batson, supra.* While this explanation need not rise to the level of that required to justify a

challenge for cause, the State may not rebut the defendant's prima facie case by stating that jurors of the defendant's race were struck based on an intuitive judgment that they would be partial to the defendant because of their shared race. *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The prosecutor also may not rebut the defendant's case by merely denying "that he had a discriminatory motive or 'affirm[ing] [his] good faith in individual selections.' " *Batson, supra* at 476 U.S. at 98 (quoting *Alexander v. Louisiana,* 405 U.S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)). Instead, the prosecutor is required to articulate a neutral explanation related to the case to be tried. *Batson, supra.*

On his motion for a mistrial, defense counsel asked that the record reflect that two members of minorities, a Mexican-American (Diaz) and an Indian (Patton), had been peremptorily challenged by the prosecutor. Defense counsel also argued that neither of the two jurors had been questioned regarding any problems or prejudices he or she might have with the case. On the basis of these facts, defense counsel urged the court to declare a mistrial because recent Supreme Court rulings precluded the prosecutor's use of peremptory challenges to strike members of minorities who might identify with the defendant.

The prosecutor responded that he had in fact questioned the panel which included Diaz. He also stated that he had peremptorily challenged Diaz because he had not received her jury questionnaire, which made her an unknown quantity to him regarding her qualifications to sit on the jury. In fact, the record indicates that the prosecutor addressed questions generally to the jury panel, of which Diaz was a member, on several occasions, and addressed her individually on one occasion.

The court overruled the defense motion, stating that it saw "nothing systematic in this situation."

A motion for a mistrial is addressed to the sound discretion of the trial court, whose ruling will not be reversed on appeal in the absence of an abuse of that discretion. *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987).

Applying the guidelines set out in *Batson, supra*, we

conclude that the trial court did not abuse its discretion in overruling the defendant's motion. Apart from evidence of the defendant's Hispanic surname, the defendant presented no evidence on the record prior to or at the time of the motion for a mistrial to show that he was in fact a member of a cognizable racial group. As such, the defendant failed to prove the first element of his prima facie case, as set out in *Batson, supra*.

In his motion for new trial, Alvarado alleged, inter alia, that the trial court erred in overruling his motion for a mistrial because the prosecutor had used peremptory challenges to strike all minority members, in violation of *Batson, supra*.

In his argument on that motion, defense counsel stated that both the defendant and Diaz were Mexican-Americans. These statements were not contested by the State. Defense counsel also argued that Diaz had been struck by the State's use of a peremptory challenge. This fact is supported by the record. Defense counsel further contended that the lack of questioning of Diaz by the State was a circumstance which, combined with the other facts, raised an inference of purposeful discrimination. He also maintained that the unavailability of a jury questionnaire for Diaz was not a neutral explanation justifying the strike because she could have been asked the same questions during voir dire.

The prosecutor responded that he would stand on the explanations which he had provided on the motion for a mistrial. He also argued that his statements during voir dire failed to indicate that he was attempting to exclude jurors on the basis of "national origin." Another consideration he cited for striking Diaz from the jury was the fact that she was young, and he feared she might identify with some of the young defense witnesses whom he thought would appear at trial. He reiterated, however, the fact that his primary consideration for challenging Diaz was the fact of his lack of background information regarding her qualifications.

Defense counsel responded that white persons who were the same age as some of the witnesses were left on the jury. He again complained that the lack of a jury questionnaire for Diaz could not justify the strike in light of the State's failure to question her.

The trial court overruled the motion for new trial on the

ground that one strike was insufficient to invalidate the entire jury under the rules announced in *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The sustaining or denial of a motion for new trial is, again, a matter left to the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of that discretion. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). Further, the trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous. *United States v. Mathews,* 803 F.2d 325 (7th Cir. 1986), *cert. granted in part* 480 U.S. 945, 107 S. Ct. 1601, 94 L. Ed. 2d 788 (1987); *Rodgers v. State,* 725 S. W.2d 477 (Tex. App. 1987).

We assume, without deciding, that defense counsel's uncontested statements regarding the defendant's and Diaz' race were sufficient to meet the defendant's burden of proof as to the first element of the *Batson* test. The question then becomes, Did those facts, combined with the other circumstances in the case, raise an inference of purposeful discrimination, and if so, did the prosecutor successfully rebut the inference by bringing forward a neutral explanation for the strike?

According to the Court in *Batson, supra*, the trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose. A pattern of strikes against persons of the defendant's race or the prosecutor's questions and statements during voir dire were cited by that Court as examples of circumstances which might support or refute an inference of discriminatory purpose. *Batson, supra.*

In this case, there is no pattern of strikes from which such an inference can be raised, as there was only one strike which was relevant to a *Batson* determination. However, a pattern of strikes is not required to show a *Batson* violation. In *Batson, supra* at 476 U.S. at 97, the Court indicated that a pattern of strikes was merely an "illustrative" example of circumstances which might permit an inference of purposeful discrimination. In reaching its determination that a defendant could show

purposeful racial discrimination by evidence of the prosecutor's use of peremptory challenges in his own case, the *Batson* Court stated: " '[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Batson, supra* at 476 U.S. at 95 (quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

A similar interpretation of the *Batson* requirements was adopted by the court in *Rodgers v. State*, which stated at 479:

> Although *Batson* requires a showing that members of appellant's race were removed from the jury, it does not speak to how many members of appellant's race must be struck. [Citation omitted.] There is no quantitative formula with which to gauge peremptory challenges. Such determinations should be based on all relevant circumstances in a particular case.

As such, the trial court in this case erred in basing its determination that there was no showing of purposeful discrimination on the fact that there was only one strike at issue. Nevertheless, we are convinced that no substantial miscarriage of justice resulted, as the trial court's overruling of the motion for new trial was justified on other grounds. See Neb. Rev. Stat. § 29-2308 (Reissue 1985).

Initially, an inference of discrimination was not raised by the prosecution's alleged lack of questioning of Diaz. While it is true that she was addressed by the prosecutor only once individually, she, like the other 23 members of the venire, was subject to the many questions addressed to the panel in general. At one point during voir dire, the prosecutor explained:

> I'm trying to just pick on a few people rather than going through and asking each of you individually these questions. I would trust that if you note something that stands out in your own minds, a problem you might have, I'm trusting you to raise your hand and let me know, if you would. And that will prevent me from having to go through and ask everybody.

Thus, the lack of individual questioning did not necessarily imply an intent to discriminate. In fact, the record reflects that seven other persons on the panel were addressed individually by the State only one time or not at all. The record does not reflect the race of any of these other prospective jurors.

Even if the evidence had been sufficient to raise an inference of purposeful discrimination, the State provided a neutral explanation for the strike of Diaz.

At the beginning of the voir dire, the trial court explained that the purpose of the jury questionnaires was to inform the court and counsel about each juror's background. The court also added: "We'll try to avoid asking those questions which are answered on that questionnaire." Similarly, at the beginning of his questioning on voir dire, the prosecutor stated: "I'll try to avoid asking questions that you've already answered on your sheets, that's exactly the purpose of it, there's no other reason to fill out information questionnaires other than to save some time at this juncture so that we don't have to ask background questions we'd ordinarily ask."

In a footnote to *Batson v. Kentucky,* 476 U.S. 79, 89 n.12, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Court provided further explanation for techniques used by attorneys to learn information about members of the venire from which the jury is likely to be drawn:

> Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case.

In *Rodgers v. State*, 725 S.W.2d 477 (Tex. App. 1987), the court held that the prosecutor had provided a legitimate neutral explanation for the peremptory challenge of a black venire member where the prosecutor explained the venire member was struck because she had failed to fully complete the jury form. The court concluded that this strike and several others were justifiable because the neutral explanations were similar to those articulated in other cases. *Rodgers, supra.* It was significant in the other cases that the prosecutor's explanations

related to the outcome of the case and were found to have been exercised in the State's interest of a fair and impartial jury. *Rodgers, supra.*

Without the benefit of Diaz' jury questionnaire, the State, in the case at bar, was limited in its information from which to judge her ability to act as a fair and impartial juror. The prosecutor can hardly be blamed for not asking Diaz those questions during voir dire, as the stated purpose of the questionnaires was to save time at that stage.

The defendant argues that two white members of the panel, who failed to provide juror questionnaires, were allowed to sit on the jury despite the fact that one had been addressed individually only once during voir dire and the other not at all. While the record shows that these two persons did sit on the jury, there is no evidence of their failure to submit jury questionnaires nor of their respective races.

We conclude that the trial court did not abuse its discretion in overruling the defendant's motion for new trial. The judgment is affirmed.

AFFIRMED.

RICHARD CAIN, APPELLEE, V. PAMELA CAIN, APPELLANT.

410 N.W.2d 476

Filed August 14, 1987. No. 85-488.

Divorce: Minors: Names: Appeal and Error. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Mark A. Klinker, for appellant.

Donald W. Kleine and Joel L. Klausen of Kleine Law Office, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This action for dissolution of marriage was instituted by Richard Cain, petitioner-appellee, against respondent-appellant, Pamela Cain, who stated in her answer and cross-petition that "she has been known by and has exclusively used the name of Pamela Elvig-Cain." The marriage was dissolved on May 24, 1985. Respondent timely appealed, assigning two errors: (1) The trial court erred in determining that in the best interests of the child of the parties his name should be changed from Timothy John Elvig to Timothy John Cain, and (2) the trial court abused its discretion in setting the level of child support. At the time of oral argument, appellant specifically abandoned her second assignment of error, and it will not be considered herein.

The record shows the following. The parties were first married on April 26, 1980. That marriage was dissolved on May 14, 1981. The parties were again married on May 25, 1984. Appellant left the marital home on July 7 and returned to live with her parents. Appellee instituted this dissolution proceeding on July 18, 1984.

Appellant bore a child on December 8, 1984. She named the child Timothy John Elvig and had that name put on the child's birth certificate. It was determined that appellee was the father of the child. The decree of dissolution restored appellant's maiden name of Elvig and set out in pertinent part "[t]hat the name of the parties' minor child is hereby changed to TIMOTHY JOHN CAIN, and the Respondent is Ordered to take all necessary steps to amend said child's birth certificate reflecting the Order of this Court."

Neb. Rev. Stat. § 71-640.01 (Reissue 1986) provides in part:

> The information pertaining to the name of an infant born in this state and reported on a birth certificate, filled out and filed pursuant to sections 71-601 to 71-648, shall comply with the following:

(1) If the mother was married at the time of either conception or birth of the child, or at any time between conception and birth, the name of such mother's husband shall be entered on the certificate as the father of the child and the surname of the child shall be entered on the certificate as being (a) the same as that of the husband, unless paternity has been determined otherwise by a court of competent jurisdiction, (b) the surname of the mother, (c) the maiden surname of the mother, or (d) the hyphenated surname of both parents.

In *Cohee v. Cohee*, 210 Neb. 855, 860, 317 N.W.2d 381, 384 (1982), we stated: "As we stated previously, the standard to be used in the accomplishment of this task [determining the surname of a child in a divorce action] is the best interests of the child, the same standard used in all cases involving custody and visitation of minor children. § 42-364."

With regard to that standard of review, see, *Clark v. Clark,* 220 Neb. 771, 371 N.W.2d 749 (1985), and *Grace v. Grace,* 221 Neb. 695, 380 N.W.2d 280 (1986). Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record in light of the factors set out in *Cohee v. Cohee, supra*, and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

In reviewing what the court has done in this case, we are unable to find that the trial court abused its discretion. The parents are the two people most concerned with the best interests of the child, and they are unable or unwilling to make that determination. At the prehearing conference, both parties rejected the use of a hyphenated name for the child. The trial court, in its discretion, ordered the surname of the child to be "Cain," perhaps in the hope this on-again-off-again relationship between the parties might be seen as a valid effort at marriage rather than a casual encounter. The trial court did not abuse its discretion in its order.

AFFIRMED.

JANET BITTNER AND DUANE BITTNER, APPELLANTS, V. OTIS W. MILLER, M.D., APPELLEE.

410 N.W.2d 478

Filed August 14, 1987. No. 85-601.

1. **Pleadings: Appeal and Error.** A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
2. **Pleadings: Proof.** At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
3. **Pleadings: Statutes.** The statute concerning amendments should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
4. **Trial: Appeal and Error.** An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
5. **Venue: Appeal and Error.** The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
6. **Juror Qualifications.** A party who fails to challenge prospective jurors for disqualification and passes them for cause waives any objection to their selection as jurors.
7. **Juror Qualifications: Physician and Patient: Medical Malpractice.** A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
8. **Actions: Negligence: Damages.** Negligence is actionable only when it results in damages.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

Debra R. Nickels and Robert V. Roach of Welsh, Sibbernsen & Roach, for appellants.

Richard E. Gee, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

This is a medical malpractice case in which the plaintiffs-appellants, Janet and Duane Bittner, wife and husband, allege that the defendant-appellee, Dr. Otis W. Miller,

negligently performed a surgical procedure in that he failed to properly tie Mrs. Bittner's fallopian tubes, thus permitting them to bleed after the incision was closed, and in that during the course of the procedure, he left a surgical sponge in Mrs. Bittner's body. The Bittners also allege that as a proximate result of that negligence Mrs. Bittner suffered extreme shock and required blood transfusions and further surgery, as the result of all of which both she and Mr. Bittner sustained damages. The Bittners appeal from the judgment of dismissal entered pursuant to the jury's verdict and assign as error the trial court's failures to (1) permit them to amend their petition and (2) grant them a change of venue. We reverse and remand for a new trial.

The Bittners' motion to change venue was based on the claims that the smallness of the community, coupled with Dr. Miller's prominent standing in it, the paucity of physicians in the community, the fact that a great number of the jury panel were past or present patients of Dr. Miller, and the fact that a former mistrial of the case had been reported in the local press, established that a fair and impartial jury could not be selected for a trial at Ord in Valley County.

The Bittners "provisionally" passed for cause the 40 members of the jury panel remaining from the 90 originally summoned, "subject to [their] earlier discussions." The discussions referred to, however, are not preserved in the record. In any event, the jury as ultimately empaneled contained nine persons who were past or present patients of Dr. Miller, each of whom had said that such relationship would not interfere with his or her duty to impartially decide the case. The Bittners exercised their six peremptory challenges so as to remove from the jury's composition two past patients of Dr. Miller, one present patient, one who was slightly acquainted with Dr. Miller, one who considered Dr. Miller a friend, and one who had no relationship with Dr. Miller.

The evidence established that on August 13, 1981, Dr. Miller, a physician engaged in family practice at Ord, delivered the Bittners' fourth child at the Valley County Hospital. The next morning Dr. Miller performed sterilization surgery on Mrs. Bittner. Later that afternoon Mrs. Bittner's blood pressure dropped, and she went into a deep and severe shock. To treat

the shock she was given at least three units of blood, administered a drug which temporarily raises the blood pressure, and placed on shock blocks, which elevate the body's extremities so that less blood will travel to them and more blood will reach the heart and other vital organs. Mrs. Bittner's condition stabilized later that evening so that, in Dr. Miller's opinion, surgery to determine the cause of the complications was not necessary.

The next day, Mrs. Bittner felt ill, had fetid breath, and produced no bowel sounds. Dr. Miller diagnosed a paralytic ileus, that is, a paralysis of the intestinal tract. Dr. Miller's treatment of the ileus was unsuccessful, and 2 days later he ordered an x ray. The x ray revealed an abnormally small amount of bowel gas, the presence of fluid, almost certainly blood, and the presence of a surgical sponge which had to have been inserted during the surgery which Dr. Miller had performed, as Mrs. Bittner had not undergone any prior surgeries. Dr. Miller failed to note the presence of the sponge when he examined the x rays, but he nonetheless recommended additional surgery to treat the ileus. Mrs. Bittner's family requested that a specialist be called in for that purpose.

The specialist operated and found bleeding at the site of the earlier surgery, removed the blood which had accumulated, stopped the bleeding, and retrieved the surgical sponge which had been left behind. The specialist told the family Mrs. Bittner's problems were caused by "a bleeder [which had been] left open." Mrs. Bittner then improved and was ultimately discharged from the hospital.

The Bittners' expert witness testified that in his opinion Dr. Miller rendered "sub-standard care post-operatively" (that is, following the sterilization surgery) and that the surgical sponge should have been "removed by somebody." It was his opinion, however, that leaving the sponge in Mrs. Bittner was not "integral to [her] problems." Dr. Miller's expert witness was also of the opinion that leaving the sponge behind did not cause Mrs. Bittner any injury.

The Bittners' expert opined that Mrs. Bittner's complications were caused by bleeding at the site of the sterilization surgery performed by Dr. Miller. Again, Dr. Miller's expert shared this

opinion. However, no witness testified that the bleeding resulted from Dr. Miller's failure to exercise the generally accepted and recognized standard of care or skill in Ord and similar communities.

When the Bittners' expert was asked whether Dr. Miller's management of the shock Mrs. Bittner experienced following the sterilization surgery was appropriate under the circumstances, Dr. Miller objected. He did so on the grounds that "the pleadings say [Dr. Miller] improperly ligated the tube and there is [sic] not pleadings here calling for [alleging] his improper treatment of shock and the question is not relevant," and also because the issue was a "complete and severe surprise" to Dr. Miller. The trial court sustained Dr. Miller's objection, and the Bittners thereupon requested leave to amend their petition by adding the claimed improper management of the shock as an independent and additional specification of negligence. The trial court denied the request on the ground the proposed amendment constituted a substantial change of the Bittners' prior claims. However, the trial court also observed that the "claim is probably included in the present pleadings in the form that you have it. . . . [T]he jury could very well find either way with the pleadings you presently have."

In spite of the denial of leave to amend the petition, Dr. Miller's expert was permitted to testify on direct examination, over the Bittners' objection, that the quality of medical care Dr. Miller rendered to Mrs. Bittner had been "excellent," including his management of the shock.

At the close of all the evidence, the Bittners moved for a directed verdict on the issue of liability. The trial court overruled the motion and submitted to the jury the issues of whether Dr. Miller negligently tied Mrs. Bittner's fallopian tubes and left a sponge in her and the amount of damages resulting therefrom. The jury, by a vote of 10 to 2, returned a verdict in favor of Dr. Miller. One of the two dissenting jurors had been a patient of Dr. Miller over 20 years earlier; the other dissenting juror did not previously know Dr. Miller.

We begin our analysis of the Bittners' first assignment of error, that the trial court erred in overruling their motion to add mismanagement of Mrs. Bittner's shock as an additional

specific act of negligence, by noting that Neb. Rev. Stat. § 25-852 (Reissue 1985) provides in relevant part: "The court may . . . in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case . . . ." We have held that permission to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed. *Christian Servs., Inc. v. Northfield Villa, Inc.*, 222 Neb. 628, 385 N.W.2d 904 (1986); *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984); *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). We have also said that although at certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue, see *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982), the statute concerning amendments should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice, *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982).

Thus, the question is whether under the circumstances of this case the trial court's rejection of the proposed amendment constituted an abuse of discretion.

While it is true that the operative petition did not specifically allege Dr. Miller was negligent in the management of Mrs. Bittner's shock, it did allege that as a proximate result of his negligence Mrs. Bittner suffered extreme shock and required treatment therefor, including blood transfusions and additional surgery. Under that circumstance, expanding the claims of negligence to include the management, or treatment, of the shock could not be considered a surprise to anyone.

The inconsistent reasons given by the trial court for denying leave to amend in and of themselves demonstrate that the proposed amendment did not result in surprise. On the one hand, the trial court said the proposed addition would substantially change the claims against Dr. Miller; on the other hand, the trial court said that the claim was probably included in the pleadings as drawn. Both conditions could not exist at one and the same time. The significance of not permitting the

amendment, of course, is that the court could not, and it did not, instruct the jury that mismanagement of Mrs. Bittner's shock was a claimed act of negligence on Dr. Miller's part.

Having prevented the Bittners from adducing evidence on whether Dr. Miller had been negligent in treating the shock, the trial court compounded its error by permitting Dr. Miller's expert witness to testify there had been no negligence in that regard.

For the foregoing reasons, we must conclude that the trial court's ruling denying the Bittners leave to amend their petition is untenable such as to have deprived the Bittners of a substantial right and may have denied them a just result, and therefore constituted an abuse of discretion. *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987); *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987).

Because the issue of venue may likely arise in the retrial made necessary by our resolution of the first assignment of error, we consider the Bittners' second assignment.

Except under certain circumstances not relevant to the present case, tort actions against Nebraska residents must be brought in the county where the cause of action arose, where the defendant resides, or where the plaintiff resides and the defendant may be summoned. Neb. Rev. Stat. § 25-409 (Reissue 1985). However, for the convenience of the parties and witnesses, or in the interest of justice, a district court may grant a party's motion to transfer any civil action to the district court for any other county. Neb. Rev. Stat. § 25-410 (Reissue 1985). As with motions to transfer venue in criminal cases, Neb. Rev. Stat. § 29-1301 (Reissue 1985); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern,* 224 Neb. 177, 397 N.W.2d 23 (1986), we will not disturb the ruling of the lower court on a motion to change venue in a civil action unless an abuse of discretion is shown. *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973); *Markel v. Glassmeyer*, 132 Neb. 716, 273 N.W. 33 (1937); *Boyd v. Chicago, B. & Q. R. Co.*, 97 Neb. 238, 149 N.W. 818 (1914); *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N.W. 431 (1909).

We also note that a party who fails to challenge prospective

jurors for disqualification and passes them for cause waives any objection to their selection as jurors. See, *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983); *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972). While the fact the "earlier discussions" to which the Bittners refer are not in the record and we therefore cannot determine that their "provisional" passing of the prospective jurors for cause did not waive any objection they may have had to the composition of the jury, see *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), we do not rest our resolution of the issue presented by this assignment on that ground.

Rather, we rest our conclusion that there was no abuse of discretion in denying a change of venue on the basis that a past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service. *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897). See, also, *Scott v. McPheeters*, 52 Cal. App. 2d 61, 125 P.2d 868 (1942). We do not overlook the fact that *Van Skike* and *Scott* involved a single juror whereas three-fourths of the jury in this case was composed of Dr. Miller's past or present patients; the fact remains, however, that each of those past or present patients solemnly declared that the relationship would not interfere with his or her impartiality and that the Bittners' voir dire examination failed to demonstrate any factual basis for rejecting their protestations of neutrality.

In compliance with this court's order, the parties submitted supplemental briefs concerning whether we should note as plain error, under the provisions of Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the trial court's failure to grant the Bittners' motion for a directed verdict on the issue of liability because a surgical sponge was left in Mrs. Bittner's body during the course of the surgery Dr. Miller performed.

While *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969), suggests by way of dictum that leaving a sponge in a patient's body constitutes negligence as a matter of law, the issue is not present in this case. That is so because negligence is actionable only when it results in damages. *Sesostris Temple Golden Dunes v. Schuman, ante* p. 7,

409 N.W.2d 298 (1987); *Floridia v. Farlee,* 201 Neb. 39, 266 N.W.2d 204 (1978). The uncontradicted evidence is that leaving the sponge in Mrs. Bittner's body did not cause any of the complications which followed the sterilization surgery. That circumstance, coupled with the fact that Mrs. Bittner's body had to be reinvaded to stop the bleeding in any event, at which time the sponge was retrieved, means the evidence failed to establish that any of the damages the Bittners may have sustained were proximately caused by leaving the sponge behind.

REVERSED AND REMANDED FOR A NEW TRIAL.

INTERNATIONAL MOVING & STORAGE, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

410 N.W.2d 483

Filed August 14, 1987. No. 85-668.

1. **Eminent Domain: Liability.** There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
2. **Eminent Domain: Damages: Evidence.** In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
3. **Jury Instructions.** In instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

A. James McArthur, for appellant.

William G. Blake of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

This is a proceeding in eminent domain brought by the City of Lincoln (City) to acquire certain property owned by the appellant, International Moving & Storage, Inc. (International), for a bridge overpass and street widening project on North 27th Street in the City. The date of the taking was January 20, 1984. A board of appraisers was appointed as provided by law and awarded International damages in the amount of $70,660. International, dissatisfied with the award, appealed to the district court for Lancaster County, Nebraska. Following trial, the jury awarded International damages in the amount of $75,000. International, believing that error had been committed, appealed to this court. We believe that there is no reversible error, and affirm.

While there is a significant and material dispute between the parties as to the amount of damages caused by the taking, there is relatively little dispute with regard to the facts relating to the issues on appeal.

International's property is located on the east side of 27th Street in the City, several hundred feet north of the Burlington Northern railroad tracks and south of Cornhusker Highway, a main east-west highway running near the northern boundary of the City. The specific property owned by International fronts on 27th Street, a north-south arterial in the City. The property in question occupies 200 feet of frontage on 27th Street and, at the time of the taking, was occupied by two buildings constructed parallel to each other, one along the north line of the property and the other along the south side. The buildings were originally constructed by International for the storage of household furnishings, as part of International's moving and storage business, with the first building having been constructed in 1961.

International no longer operates a storage business in the property and has, for some time, rented portions of the

buildings to various tenants, including a motorcycle repair and customizing shop, a carpet cleaner, the University of Nebraska, a gunsmith, a wrecker service, and a body shop and auto repair business.

The taking consisted of a strip of land 32 feet wide along the west side of International's property, together with a temporary easement for use of an additional 10-foot strip for construction purposes. The taking was necessitated by a project to construct a bridge over the Burlington Northern tracks and to widen and improve 27th Street in the vicinity of Cornhusker Highway. As a result of the project, vehicular access off of 27th Street to and from International's property was eliminated.

The evidence discloses that after completion of the project, the elevation of 27th Street will be approximately 11 feet above International's property at the south end and approximately 2.6 feet above the property at the north end. The side of the overpass facing International's property will be solid concrete. A new access to International's property is provided by means of a new street constructed along the east side of the property, thus forcing the back of the property to become the front. The new street is known as the fairgrounds loop and serves as a service road to properties adjacent to the railroad overpass, including International's. It likewise provides an improved access road to the State Fairgrounds, located near the property in question.

International has assigned four specific errors involving two particular matters. Assignments Nos. 1, 2, and 4 relate to testimony sought to be introduced by International with regard to specific traffic counts on 27th Street at or before the time of the taking. Assignment of error No. 3 relates to the giving of instruction No. 7 by the court.

Prior to trial the City filed a motion in limine to prohibit International from introducing any evidence concerning specific traffic counts on 27th Street. Further, during the course of the trial, the district court sustained an objection made by the City with regard to the admission of exhibit 6, a specific traffic count introduced by International, and further sustained objections to offers of proof made by International after the specific objection with regard to exhibit 6 was sustained.

The record does reflect, however, that while the court did not permit evidence of specific traffic counts to be presented to the jury, the court did permit evidence to be presented that 27th Street was a major thoroughfare. Further, the jury was permitted to hear testimony, offered both directly by International and by cross-examining the City's witnesses, regarding the effect that the removal of direct access to 27th Street would have on the property. The jury was further informed that the zoning on the land involved a high-traffic area where visibility and vehicular access were important and that the loss of direct access to 27th Street would make the property less attractive for the higher value commercial uses. The jury was informed by all of the witnesses who testified regarding values that the change of access would decrease the value of the property, and some testified regarding the effect on value by reason of the loss of visibility due to the elevated grade of the new thoroughfare. The jury was further informed by all appraisers that the change in layout, forcing the back of the property to become the front, was a consideration to be taken into account in determining the value of the property after the taking. Additionally, the jury viewed the property and traveled the relevant length of North 27th Street.

International, in its brief, concedes that it has no right to any specific traffic flow, noting: "Plaintiff concedes that there is no vested right in a landowner to the continued flow of traffic by his property so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability." Brief for Appellant at 18. International recognizes that we have so held in a number of decisions, including *Rossitto v. City of Omaha*, 199 Neb. 260, 258 N.W.2d 126 (1977), *Deyle v. State*, 194 Neb. 36, 229 N.W.2d 565 (1975), *Verzani v. State*, 188 Neb. 162, 195 N.W.2d 762 (1972), and *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964).

International, however, seeks to make a distinction by arguing that the taking did not result in a mere reduction or elimination of traffic but, rather, a denial of access to the existing traffic, and, therefore, the traffic count was relevant evidence which the district court should have permitted

International to offer in arriving at International's damages. In attempting to make this distinction International argues:

> However, that is simply not the situation here. There was neither a reduction of traffic nor a diversion of traffic from North 27th Street. Indeed, the City's own engineer testified that not only would there be no diversion of traffic from this improvement, but that it was anticipated there would be an immediate substantial increase in the traffic along North 27th. The trial court simply misunderstood the issues involved here.

Brief for Appellant at 18.

If, indeed, International was not entitled to damages for the total elimination of traffic, which International concedes, we fail to understand how it could be entitled to damages by reason of the fact that, while the traffic still flows by its property, it is not able to get the specific cars to leave the road and come directly onto its property but, rather, must direct the cars to an alternative means of access.

This is exactly what occurred in *Painter v. State, supra*. The State of Nebraska constructed a median down the middle of a road abutting onto plaintiffs' tavern property. The evidence disclosed that the project would prevent 65 to 70 percent of the tavern's customers from leaving the road and gaining access to plaintiffs' tavern. In refusing to permit plaintiffs to recover damages for the construction of the median, we said at 911, 131 N.W.2d at 591:

> The rule is the same as if the islands had been constructed without the taking of any property by eminent domain. [Citation omitted.]
>
> The situation may be summed up as follows: Property owners abutting upon a public thoroughfare have a right to reasonable access thereto. This right of ingress and egress attaches to the land. It is a property right as complete as ownership of the land itself. But as to damages claimed by reason of a change in the flow of traffic by placing medians in the center of a street, they result from the exercise of the police power by the state and are noncompensable as being incidental to the doing of a lawful act. As such, they are wholly unrelated to the

> taking of the land for the purpose of widening the street and constitute no element of damage to the land remaining after the taking.

A case similar to the instant case is *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N.W. 582 (1907). Gillespie owned a tract of land abutting a heavily traveled thoroughfare which was closed in order to construct a viaduct. In affirming an award of damages to the property owner, we said:

> In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, *not as independent items of damage*, but for the purpose of determining the market value of the property before and after the construction of such improvement.

(Emphasis supplied.) (Syllabus of the court.) The building of the bridge which prevented cars from driving onto International's property directly from 27th Street was no different than the construction of a median which prevents cars from getting directly to property located across the median.

International was permitted to introduce evidence regarding the taking of ingress and egress and the loss of access occasioned by the project and was permitted to recover damages by reason thereof. What it was not permitted to do was to offer, as evidence of damages, specific traffic counts. If such evidence had been permitted, International would have been permitted to offer evidence of an independent item for which it was not entitled to recover damages.

The reason that the specific traffic counts were not relevant is because International is not entitled to damages for the traffic flow, but only for the damages caused by reason of the taking of access to the property itself. We believe that the district court committed no error in this regard.

That leaves us then with the last issue: whether instruction No. 7 was in error. Specifically, International contends that the district court erred in instructing the jury that

> [i]n determining this question [the amount of damages] you must not take into consideration any conduct of the defendant that merely has the effect of changing the flow of traffic past the plaintiff's property, or that may require

persons to take a more circuitous or longer route to reach certain points on the plaintiff's property because of traffic regulations.

Again, we are unable to determine how this instruction can constitute error. Not only is the statement a correct statement of the law, see *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964), but when the entire instruction is read, it is clear that there is no misstatement nor, as contended by International, is it confusing to the jury. Instruction No. 7 in its entirety reads as follows:

INSTRUCTION NO. 7

The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without compensation for his loss. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.

The plaintiff contends that it has been denied reasonable access from North 27th Street to its property by the taking of the defendant. The plaintiff is entitled to be compensated if it has been deprived of reasonable ingress to and egress from its property to North 27th Street under all the circumstances shown by the evidence.

In determining this question [the amount of damages] you must not take into consideration any conduct of the defendant that merely has the effect of changing the flow of traffic past the plaintiff's property, or that may require persons to take a more circuitous or longer route to reach certain points on the plaintiff's property because of traffic regulations.

If you find from a preponderance of the evidence that the plaintiff has been deprived of reasonable ingress to and egress from its property under all the circumstances, you should take this fact into consideration in determining the plaintiff's damages under Instruction No. 6. It is not, however, to be considered as a separate element of damage.

> If you do not so find, then you should not take it into consideration in determining the plaintiff's damages.

Instruction No. 7 correctly advises the jury as to what it must find before International is entitled to recover damages by reason of being denied ingress and egress to the street abutting its property. See *Balog v. State*, 177 Neb. 826, 131 N.W.2d 402 (1964). We have regularly and consistently held that " '[i]n instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party, if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.' " *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 474, 106 N.W.2d 727, 738 (1960). See, also, *Lansman v. State*, 177 Neb. 119, 128 N.W.2d 569 (1964).

We believe that when all of instruction No. 7 and the other instructions are read together, as they must be, they correctly and accurately reflect the law. There was no error.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE and HASTINGS, JJ., concur in the result.

GARY C. FRERICHS AND DIANE L. FRERICHS, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA HARVESTORE SYSTEMS, INC., AND A.O. SMITH HARVESTORE PRODUCTS, INC., APPELLEES.

410 N.W.2d 487

Filed August 14, 1987. No. 85-727.

1. **Summary Judgment.** A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law.
2. **Courts: Judgments.** A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
3. **Summary Judgment.** A court may not enter summary judgment on an issue not presented by the pleadings.

4. **Pleadings.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.

Appeal from the District Court for Cedar County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Law Offices of Robert M. Cook, and Michael T. Brogan of Brogan & Stafford, P.C., for appellants.

David A. Domina of Domina & Gerrard, P.C., and David H. Ptak of Ptak & Schukei, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiffs-appellants, Gary C. and Diane L. Frerichs, husband and wife, brought this action in the district court for Cedar County, Nebraska, seeking damages from defendants-appellees, Nebraska Harvestore Systems, Inc., a Nebraska corporation, and A. O. Smith Harvestore Products, Inc., a Delaware corporation, in connection with the purchase of a model 2033 Harvestore grain silo systemized with an attached feeder, for the purposes of storing high-moisture corn and feeding it to dairy animals. Plaintiffs' petition was filed December 16, 1982. Their fourth amended petition, filed May 1, 1985, set out three "causes of action" seeking damages. As will be seen, these "causes of action" are differing theories of recovery, but they will be treated herein as pled.

The first cause of action pled breach of express and implied warranties. It was alleged that defendants had warranted to plaintiffs that the Harvestore storage feeder system would produce 50 pounds of milk per day per cow; that the system was suitable for use by the plaintiffs; and that the defendants would stand behind the system, install it correctly, and make plaintiffs' dairy operation more efficient and profitable. The second cause of action alleged negligence of the defendants in the design and installation of the system as well as the failure to properly test the system or to warn the plaintiffs of the dangerous characteristics of the system. The third cause alleged fraud of defendants in advising plaintiffs that the Harvestore

storage feeder system was safe, efficient, and profitable for plaintiffs' use; would give more production per animal; was oxygen limiting and was superior to concrete structures; and would prevent spoilage of feed. Plaintiffs sought damages of $363,000 on each cause of action.

After the overruling of defendants' demurrers, each filed a separate answer generally denying the allegations of the fourth amended petition and alleging that the statute of limitations had run as to all of plaintiffs' causes of action.

On May 10, 1985, the matter was set for jury trial to begin August 6. On August 5 the court partially sustained defendants' motion in limine and reversed an earlier order of the court which had denied defendants' motions for partial summary judgment. The court then granted partial summary judgment as to plaintiffs' claim as to implied warranty, set out in the first cause of action, and as to negligence, set out in the second cause of action. The court's order stated the evidence conclusively showed the statute of limitations had run on these causes of action.

The matter proceeded to trial on plaintiffs' claims of express warranty and fraud. On the day of the trial plaintiffs moved for a continuance, advising the court that as a result of the granting of defendants' motion, plaintiffs were "surprised and severely prejudiced." This motion was overruled and plaintiffs were directed to proceed with the trial. Plaintiffs elected to stand on their motion for continuance. A jury was selected over plaintiffs' continuing objection. After plaintiffs refused to make an opening statement, defendants made an opening statement. The court then directed plaintiffs "to call your first witness." Counsel for plaintiffs then stated before the jury that "the plaintiffs, at this time, are unable to offer any evidence and therefore regretfully and respectfully rest." Defendants then moved for a directed verdict. Defendants' motion was sustained, and the district court dismissed plaintiffs' fourth amended petition.

Plaintiffs timely appealed to this court, assigning as error that the trial court erred in granting partial summary judgment and determining the statute of limitations had run on plaintiffs' first and second causes of action, in granting such motion sua

sponte after initially overruling the motion, in sustaining defendants' motion in limine and motion for directed verdict, and in failing to sustain plaintiffs' posttrial motions. For the reasons hereafter stated, the judgment of the district court for Cedar County is affirmed in part and reversed in part.

The pertinent procedural background in the record before us shows the following. On May 10, 1985, the trial court continued the trial, which had been set for May 20, and set the case for trial on August 6. On May 8, 1985, defendant Nebraska Harvestore had filed its motion for partial summary judgment, seeking judgment on plaintiffs' first cause of action (breach of warranty) and third cause of action (fraud). A motion seeking the same relief was filed by defendant A. O. Smith on May 28, 1985.

A hearing was held on the defendants' motions for partial summary judgment on June 7, 1985. On July 30, 1985, the court found that genuine fact issues existed and overruled defendants' motions for partial summary judgment.

In the meantime, on July 17, 1985, defendants had filed a motion in limine seeking to exclude certain evidence listed generally in 14 paragraphs in the motion.

On August 2, 1985, a hearing was held on defendants' motion in limine. Defendants submitted six exhibits in support of their motion. Counsel for plaintiffs then inquired if plaintiffs' exhibits should be offered in evidence and informed the court that 527 exhibits had been submitted to the bailiff to be marked. Plaintiffs then offered "[e]xhibits 1 through 527 of the plaintiffs' case because it is only by reference to all of those items that this Court may reach a determination as to whether that evidence of the evidence as suggested by Mr. Domina would be properly excluded."

Defendants' exhibits 1 through 6 and plaintiffs' exhibits 7 through 13 (apparently with reference to the motion in limine) were received, and exhibits 1 through 527 were offered in opposition to the motion in limine and were "rejected." The motion was taken under advisement. Different exhibits 1 through 12 had previously been received at the June 7, 1985, hearing on defendants' motions for partial summary judgment.

It is at this point that we should note the wisdom (at least in this case) of Neb. Ct. R. of Prac. 5F(3) (rev. 1986), which provides in part: "Exhibits are to be marked in numerical order, irrespective of the party producing them." In this case, at this point, we are faced with 12 exhibits, numbered 1 to 12, on defendants' motions for partial summary judgment; 13 exhibits, numbered 1 to 13, submitted on defendants' motion in limine; and 527 exhibits, numbered 1 to 527, in response to defendants' motion in limine. To say the least, accurate references to exhibits numbered below 13 are difficult.

On August 5, 1985, the court informed the parties that "I find that I was in error in overruling the motion for summary judgment that insofar as it relates to the issue of statute of limitations on the implied warranty theory of the plaintiffs." After the court directed defendants' counsel to prepare a journal entry, the following colloquy occurred:

> MR. COOK [plaintiffs' counsel]: May I have one point of clarification.
>
> THE COURT: Yes.
>
> MR. COOK: With respect to the reversal on the summary judgment, would that also go, may I inquire of the Court, to negligence?
>
> THE COURT: It would.
>
> MR. COOK: May I ask that the Court include that. I have to explain to my clients exactly what we have left.
>
> THE COURT: Surely. I think what you have left is any express warranty that go to future performance of the —
>
> MR. COOK: The Court's order this morning excludes implied warranty as well as negligence?
>
> THE COURT: I will so state. I will reverse myself on the motion for summary judgment relating to the statute of limitations on the negligence claim. I find that there is no genuine issue as to any material fact and that as a matter of law the defendants are entitled to judgment on the negligence claim set forth in plaintiffs' fourth amended petition, for the reason that more than four years have elapsed since the system was placed in use on July 31, 1978 by the plaintiff and the filing of this action on December 16, 1982.

The trial court after reconsideration thus granted, in part, defendants' motions for partial summary judgment after determining that there was no dispute as to any material fact and that defendants were entitled to judgment as a matter of law on the fact that the statute of limitations had run on plaintiffs' implied warranty theory. The court also granted summary judgment for defendants on plaintiffs' negligence theory. Plaintiffs contend that the applicable statute of limitations had not run and in any event it was error for the court to reverse its earlier order denying defendants' motion for summary judgment because such action constituted a ruling, sua sponte, on defendants' motion for summary judgment. Plaintiffs contend such action is beyond the jurisdiction of the trial court.

Compounding the problem before us is the fact (not mentioned in the parties' briefs) that defendants made no motion seeking partial summary judgment as to plaintiffs' second cause of action alleging negligence. As set out above, defendants did specifically seek partial summary judgment as to plaintiffs' first cause of action (breach of warranty) and third cause of action (fraud).

We consider that the question as to the court's granting a partial summary judgment on the negligence issue is before us because, although plaintiffs have not specifically addressed the question of how their negligence theory was ruled on when there was no motion addressing that issue, plaintiffs have assigned the following error: "Whether a District Court commits an abuse of discretion by granting a partial summary judgment in favor of a party sua sponte."

Insofar as that assignment is directed to the question whether a district court may reverse its order without the filing of a new motion, the contention is without merit. A trial court may modify or vacate its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court. *Sargent Feed & Grain Co. v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984). Such discretion must be exercised reasonably and not arbitrarily, depending upon the facts and circumstances as shown by the record. *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985). The record shows

the trial court vacated its earlier order overruling the motions for summary judgment because the trial court determined, after further reflection, that the evidence conclusively showed the applicable statute of limitations as to implied warranty had run. We find no abuse of the trial court's discretion in correcting an earlier order that the court determined was conclusively shown to be incorrect.

The problem of the exercise of the court's discretion in disposing of plaintiffs' cause of action alleged under a negligence theory by way of summary judgment is different. It is true that possible disposition of plaintiffs' negligence claim was injected into the case by plaintiffs in the colloquy set out above. It is also clear, however, that no motion had been made by either defendant as to summary judgment on plaintiffs' negligence claim. The court in disposing of the negligence theory was not acting on a motion submitted and did not have the benefit of an adversary hearing on that issue. Examination of the fourth amended petition shows there may be issues as to alleged negligent acts which might have occurred after July 31, 1978. The court was acting "sua sponte" in the truest sense and was not, as with the motion for summary judgment based on implied warranty, acting to correct a ruling on a motion that had been properly submitted.

We have stated "that the summary judgment procedure is purely statutory and that a motion for summary judgment requires compliance with all the statutory requirements." *Curley v. Curley*, 214 Neb. 780, 783, 336 N.W.2d 103, 105 (1983). There is a clear difference in changing a ruling on a motion properly filed and submitted and in ruling on a motion never made. A court may not enter a summary judgment on an issue not presented by the pleadings. Accordingly, the cause must be remanded for further proceedings on plaintiffs' claim of negligence only.

With regard to plaintiffs' assignment of error on the merits of the court's ruling on the issue of implied warranty, we find the plaintiffs' contention in that regard is without merit. We have held that the purpose of summary judgment is to pierce sham pleadings and dispose of cases where there is no genuine claim or defense. *Draemel v. Rufenacht, Bromagen & Hertz,*

Inc., 223 Neb. 645, 392 N.W.2d 759 (1986). A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law. The rules as to the granting of summary judgment have been applied to determinations as to the running of the applicable statutes of limitations. *Seagren v. Peterson,* 225 Neb. 747, 407 N.W.2d 790 (1987).

To determine whether the partial summary judgment was appropriate in the case at bar we must determine if there is any genuine dispute as to facts showing that the statute of limitations has run on plaintiffs' breach of implied warranty claim. When the statute of limitations begins to run must be determined from the facts of each case. Generally, a cause of action accrues and the statute begins to run when the aggrieved party has the right to institute and maintain a suit even though the plaintiff may be ignorant of the existence of such cause of action. *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985). Neb. U.C.C. § 2-725(1) (Reissue 1980) provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Section 2-725(2) further provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ." See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

In the case at bar, the record clearly shows without dispute that the Harvestore storage feeder system about which plaintiffs complain was purchased in May of 1978 and placed in use on July 31, 1978. Plaintiffs' original petition in this matter was filed on December 16, 1982, more than 4 years after tender of delivery was made. In the deposition of plaintiff Gary Frerichs, plaintiff stated, with regard to a decline in milk production, that the decline was probably "five pounds in the first two months, five pounds per cow." There was no factual dispute about the time of the discovery of the alleged breach.

Plaintiffs complained about the system within 2 months of its installation. It was not error for the district court to grant summary judgment as to plaintiffs' cause of action based on breach of implied warranty.

Plaintiffs' next assignment of error is "[w]hether the District Court abused its discretion by granting a Motion in Limine, thereby excluding evidence on the basis of an asserted lack of foundation or basis in fact for such evidence." To set out such a statement is to demonstrate its fallacy. A motion in limine is not to be used to obtain a final ruling on the ultimate admissibility of evidence. As stated in *State v. Tomrdle*, 214 Neb. 580, 585, 335 N.W.2d 279, 283 (1983):

> A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. Cf. *State v. Bennett*, ____ R.I. ____, 405 A.2d 1181 (1979). As explained in *Lagenour v. State*, 268 Ind. 441, 450, 376 N.E.2d 475, 481 (1978): "[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." As noted in *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974): "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."

In this case it appears that defendants were trying to limit evidence generally on the basis such evidence is irrelevant, or circumstantial, or without foundation. A shotgun approach in marking 527 exhibits is submitted as a defense to a shotgun motion in limine with 14 paragraphs. The trial court informed the parties that the disposition of defendants' motion was not to be controlled by "a mini trial of the issues." The court "rejected" plaintiffs' 527 exhibits in that connection.

The ruling on defendants' motion in limine is not reviewable in the procedural context of this case. There was literally nothing before the court to rule on with regard to evidence. There was no evidence offered by plaintiffs at the trial. There was no offer of proof of any fact the plaintiffs wished to submit to the jury. The only possible ruling the court could make after plaintiffs rested without adducing evidence was to grant defendants' motion for directed verdict.

A further question to be considered is that raised by plaintiffs when they allege that the trial court abused its discretion by failing to grant plaintiffs a continuance of the trial as the trial began on August 6, 1985.

With regard to the court's failure to grant plaintiffs' motion for continuance, it is the law in Nebraska that a motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986); *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986). In the case at bar, the court did not abuse its discretion in denying plaintiffs' motion for a continuance. When the trial began, plaintiffs had pending causes of action for fraud and for express warranty. This matter had been set for trial since May 1985, and the plaintiffs should have been able to proceed on the fraud and express warranty theories even though their other theories were dismissed by the summary judgment ruling. The plaintiffs elected to stand on their motion for continuance and refused to adduce any evidence. If plaintiffs were ready to try an action in which they alleged four theories of recovery, they certainly had to be ready to try their case presenting two theories of recovery. It was plaintiffs' own refusal to put on evidence which prevented them from proceeding, not the action of the court. The trial court did not err in refusing to grant plaintiffs a continuance.

Plaintiffs' final assignment of error alleges the district court abused its discretion in failing to sustain plaintiffs' posttrial motions for new trial, to reconsider the motion in limine, and to review the partial summary judgment. After a review of the record and in light of our finding there was no abuse of

discretion in the court's ruling on the motion in limine, on the motions for partial summary judgment, and on the implied warranty claim, we find no abuse in the court's failure to grant plaintiffs' posttrial motions. The trial court did not err in denying plaintiffs' posttrial motions.

The summary judgment entered in defendants' favor on the negligence issue is reversed and the cause remanded for further proceedings on that issue only. The judgments of the trial court in all other respects are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARVIN HUGHES AND DOROTHY HUGHES, HUSBAND AND WIFE, APPELLANTS, V. ENTERPRISE IRRIGATION DISTRICT, APPELLEE.

410 N.W.2d 494

Filed August 14, 1987. No. 85-746.

1. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
3. **Injunction.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief.
4. **Proximate Cause: Words and Phrases.** *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
5. **Injunction: Proof: Proximate Cause.** By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

R.L. Gilbert of Gilbert Law Offices, P.C., for appellants.

James R. Hancock of Hancock & Denton, and Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Marvin and Dorothy Hughes (Hughes) sued Enterprise Irrigation District in the district court for Scotts Bluff County and sought an injunction and damages regarding Enterprise's dam constructed in the North Platte River. In their petition, Hughes alleged ownership of their real estate adjacent to the North Platte River, Enterprise's existence as a political subdivision of the State of Nebraska, and Enterprise's construction of its dam, which prevented adequate "passage of all water, ice and debris" in the river, resulting in overflow, which caused damage to Hughes' crops and real estate. Hughes then alleged prospective and continued overflow, and requested removal of the dam obstruction and assessment of damages.

Hughes had filed, and Enterprise rejected, a tort claim against Enterprise for damages. See Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983) (Political Subdivisions Tort Claims Act). According to the order entered on the pretrial conference, the issue involved in this litigation related to injunctive relief and damages caused by Enterprise's structure in the river.

LOCATION OF THE FARM AND DAM

Hughes owns a farm which includes 79 acres of cropland abutting the North Platte River. The north bank of the river, which flows from west to east, is the southern boundary of the Hughes farm. A bridge for Highway 226, which runs in a north-south direction, bisects the Hughes farm and crosses the river. At the southeast corner of the Hughes tract and approximately 1,400 feet east of the highway bridge, Enterprise constructed its dam to divert water to the area within the irrigation district.

The cement base of Enterprise's diversion dam ran from bank to bank of the river, a distance of 260 feet. Steel piers, 8 feet apart, were placed in the concrete base and supported wooden planks placed lengthwise against the piers on the upstream side for diversion of the river. The dam, from riverbed to top, was approximately 30 inches high. Toward the dam's north end, at its juncture with the river's north bank, was a headgate which, when opened, permitted water to be diverted into a canal for transportation to the irrigated acres served by Enterprise.

The river had a history of seasonal high water. Excess snowmelt and rainfall, impounded and then released from several upstream reservoirs, contributed to spring and summer flooding of Hughes' farm. In one form or another, Enterprise's diversion dam has existed in the river since the turn of the century. However, regarding overflow in 1983 and 1984, there is no evidence of any antecedent causal relationship between such previous flooding and any structure in the river near the Hughes farm.

INUNDATION IN 1983 AND 1984

In April 1983, the river's flow began to increase and eventually reached 5,500 cubic feet per second (cfs) at a point west of the highway bridge, where the river overflowed its north bank and flooded part of Hughes' farm. At the point of overflow, the river's flow persistently exceeded 5,500 cfs from the spring of 1983 until the fall of that year.

According to Marvin Hughes, in the spring of 1983 the river's overflow inundated his land west of the highway, resulting in standing water, with a depth of 1 foot, covering part of the cropland and a "muddy" condition on the remaining cropland west of the highway. Such condition existed until September 1983. Hughes' land east of the highway became unusable on account of a condition which Hughes attributed to "seepage," that is, water had "come up from underneath" the land's surface and created a damp condition, which existed until disappearance of the overflow on the land west of the highway. The same patterns and conditions recurred in 1984 whenever the river's flow reached 5,500 cfs in the bridge-dam area.

Hughes claimed that Enterprise's diversion dam caused the

river to back up, resulting in the river's overflow onto Hughes' farm. Enterprise denied that its conduct or structure caused any damage to Hughes. Therefore, the crucial and dispositive question is: Did Enterprise's diversion dam cause the overflow?

THE EXPERTS

Hughes called John Baker, a civil engineer, as an expert witness to testify about the cause of the river's overflow. Baker had prepared two "water surface profiles" of the river. One profile was prepared for 1983 when the river's flow was 5,500 cfs; the other for 1984 when the flow was 1,200 cfs. Measurements were taken 500 feet downstream from Enterprise's diversion dam and 2,000 feet upstream from that structure. For the stretch of the river from west of the highway bridge to Enterprise's dam, the riverbed had a natural slope of 6.6 feet per mile. Taking into account the various elevations and other measurements, such as the river's depth and rate of flow at the flood site, Baker concluded that the river, in the absence of Enterprise's dam, could have accommodated an additional depth of 2½ to 3 feet before reaching 5,500 cfs and running over its north bank. However, with the dam as an obstruction raising the level of the river, the additional water backed up to the point of overflow west of the highway bridge. Therefore, according to Baker, Enterprise's dam caused inundation of Hughes' land west of the highway and the presence of water on the land east of the highway.

Enterprise called an expert witness, Meredith Schaff, a consulting engineer who was familiar with the river and its flood problems. Schaff's experience included work for the Corps of Engineers and cities along the river. Schaff disputed Baker's method and computations. Referring to Baker's 1983 river profile, Schaff testified that the profile "really shows . . . that there's so much water flowing down the stream and the water's going over the top of the [dam which] actually has no damming effect." To buttress his position, Schaff then referred to Baker's 1984 river profile, when the river's flow was 1,200 cfs. At the diversion dam, with the depth of the river increased by the obstruction, the water backed up "less than 150" feet before the water which had accumulated at the dam flowed over the top of the dam. Under such circumstances, the

diversion dam was merely a "spillway" over which the river flowed without affecting any upstream depth and, consequently, did not affect the river's flow or depth at the point of overflow onto Hughes' land. Thus, Schaff concluded that Enterprise's diversion dam was not a cause of any water problem, whether inundation or seepage, on Hughes' land.

The district court specifically found that any overflow was "not proximately caused by [Enterprise's] diversion structure," found generally in favor of Enterprise on "all causes of action," and dismissed Hughes' petition.

Hughes has raised several assignments of error, but each is an aspect of the basic contention that the district court erred in its finding that Enterprise, by its diversion dam, did not cause damage to Hughes.

STANDARDS OF REVIEW

Equity Actions

In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1985); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

Tort Claims Against a Political Subdivision

"A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987).

INJUNCTIVE RELIEF

"A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief." *Belsky v. County of Dodge*, 220 Neb. 76, 80-81, 369 N.W.2d 46, 51 (1985). "*Cause* is defined as 'that which produced an effect, result, or consequence.' " (Emphasis in original.) *Belsky v. County of Dodge, supra* at 85-86, 369 N.W.2d at 53. " ' "The defendant's conduct is a cause of the

event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." ' " *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 57 (1986). By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed. See, *Belsky v. County of Dodge, supra; Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W.2d 890 (1976).

Although both expert witnesses offered quite contrasting opinions regarding the role of Enterprise's diversion dam in relation to the river's overflow, we reach the same conclusion as that of the district court, namely, Hughes has failed to prove Enterprise's conduct or structure caused the water damage. Evidence presented a history of high water and seasonal inundation of land adjacent to the river, a longtime circumstance without previous causal correlation to Enterprise's diversion dam. Further, according to Enterprise's expert witness, the river profiles demonstrate that the diversion dam was incapable of containing the river's flow at the depth necessary to result in the river's backing up to the point of overflow west of the highway bridge. We find it is more likely that the river would spill over the diversion dam with its height of 30 inches before any obstructed water would back up to a point more than 1,400 feet west of the dam and at that point overflow the river's north bank. Having observed the experts during their testimony, the district court apparently reached that same conclusion about causation, namely, the explanation offered by Enterprise is more credible under the circumstances.

Regarding Hughes' tort claim against Enterprise, we cannot conclude that the district court's finding is clearly incorrect, especially in view of Hughes' failure of proof concerning causation.

In reference to any other cause of action, including a claim pursuant to Neb. Const. art. I, § 21, Hughes failed to prove the cause-and-effect relationship between Enterprise's conduct and damage to Hughes.

AFFIRMED.

BANNER COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

411 N.W.2d 35

Filed August 14, 1987. No. 86-699.

1. **Constitutional Law: Taxation: Valuation.** The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
2. _____: _____: _____. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
3. **Constitutional Law.** The Constitution, as amended, must be read as a whole.
4. **Constitutional Law: Taxation.** The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
5. **Constitutional Law: Legislature.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
6. **Constitutional Law.** In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.
7. _____. A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.
8. **Constitutional Law: Valuation.** The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
9. **Statutes.** Neb. Rev. Stat. §§ 77-1502 and 77-1504 (Reissue 1986) were not repealed by 1985 Neb. Laws, L.B. 271.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William E. Peters of Peters & Chunka, P.C., for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This case arises out of a controversy concerning the valuation for tax purposes of irrigated cropland in Banner County, Nebraska, for 1986. The county assessor used the 1986

Nebraska Agricultural Land Valuation Manual to establish values of all agricultural land in the county for 1986.

Banner County officials had attended public hearings before the Tax Commissioner's staff regarding the implementation of the 1986 land manual prior to its completion. At those meetings, certain officials from the county testified there appeared to be some problem with some of the calculations. The land manual calculations were ultimately completed, and the manual was used by the assessor to determine values for the 1986 tax year.

Following the receipt of notices by taxpayers in the county, a number of questions were received by the county board of equalization concerning the values placed on irrigated cropland. Hearings were held on April 21 and 28, 1986, to permit all interested persons to provide information concerning the operation of such lands. After the hearings most of the owners of irrigated lands in the county filed formal protests, and a formal hearing was set for May 19, 1986.

Based on the evidence presented at the hearing, the board made several findings.

The board first found that all interested parties had received notices of increased valuations caused by use of the land manual for the 1986 tax year. The board then stated the increase for the value of irrigated lands was substantial and that the board had investigated the increase. The board found the valuations of irrigated lands had been increased by more than 54 percent. The board stated that it had evidence the valuations of dryland in the county compared favorably to counties adjoining Banner County but that values for irrigated land were considerably lower in the adjoining counties.

The board stated there was evidence the irrigated land in the county was very sandy ground and subject to severe erosion. The board further found the assessor had historically adjusted the values of these lands to compensate for the severe erosion and inadequate water supply in the area. The board found that such adjustments by the assessor were no longer possible under the 1986 land manual. The board further found that testimony presented at the hearing confirmed the previous appraisals made by the assessor, that the lands involved were sandy, that

there was severe erosion, and that the land was of lesser value than lands in Cheyenne and Kimball Counties which had received a lower value in the manual. The board stated it had viewed the lands whose valuations were being protested and land on which protests were not filed, had confirmed the testimony presented at the hearings, and concluded adjustments to the land manual valuations were required to determine the true value of the land. The board then asked the assessor to further review the information used by the department and to recalculate the values for such land.

The board stated such recalculations included the addition of information not used by the department, such as the type and condition of the land, and that the resulting values compared favorably with other counties and the information provided by the owners.

On May 29, 1986, the Banner County Board of Equalization adopted a resolution reducing the values of the subclasses of irrigated land in Banner County for the 1986 tax year from the values determined by the 1986 land manual. This adjustment was reported to the State Board of Equalization and Assessment by the State Tax Commissioner on July 10, 1986. The state board then directed the Tax Commissioner to review the action taken by Banner County, as well as by Custer County, Sherman County, and Cherry County, and to report her findings and recommendations on August 11, 1986. Notice to show cause was mailed to Banner County, and a hearing was scheduled for July 29, 1986. Banner County requested a continuance, which was granted, and the hearing was set for August 5, 1986.

At the hearing before the Tax Commissioner the county board contended it had acted properly in decreasing the values of irrigated land. The board contended the figures which the Nebraska Department of Revenue had used were flawed in two aspects: first, because the department improperly used harvested acres rather than total acres to calculate the agricultural land formula and, second, because the department improperly calculated the factor used to ascertain a 5-year average yield as established by the crop reporting service. The county also contended the values established in the 1986 land

manual did not achieve equalization among the counties. Barbara Stoddard, deputy county assessor for the county, testified the recalculation of values was done in the following manner. The formula from the land manual was used to determine the "contribution of value." She then went back to the crop reporting service report and took

> the acres under the crops that were sent out by the state for our use. I have recalculated those and came up with the average yield for Banner County for the last five years. The only change in that that I did make was in the sugarbeet crop, which we did use the yields for the years 1979 through 1984, [because] the 1984 report . . . could not be used because there was still some question as to the price to use . . . .

She also used the actual number of irrigated acres in Banner County as indicated on the 1985 abstract, which was 21,192 acres. She used the same percentage as the state used to determine crop mix. She then calculated the crop yield, which differed from that calculated by the state. That yield was then used in the computation as required by the formula, resulting in a different contribution to value, which lowered the value of irrigated lands from subclass 4A through subclass 2A.

Stoddard testified that she also looked at the values for dry cropland but found that very little change was necessary. Using the yield statistics from the Soil Conservation Service (SCS) reports in calculating the value of dry cropland resulted in a variance of only 1 or 2 percent from the values obtained using the manual, so the averages obtained by the land manual were used to value dry cropland.

Stoddard testified the state had used approximately 16,500 acres in the original manual calculation for the county. Stoddard testified she used the larger number because she believed it was necessary to include all irrigated acres because a crop is raised thereon every year and there is no set-aside on irrigated acres. Stoddard testified the calculations used by the state for dry cropland had accounted for most of those acres in the county and did not require adjustment.

The county assessor testified he had supervised the recalculations. He testified he had applied the land manual as

published in setting the original values and sending notices for 1986. The final adjustments occurred May 29, 1986. A public notice was published following that action to inform the taxpayers, which included the minutes of the board proceedings. It was his understanding the board was acting to correct an apparent problem in the valuations of irrigated land which had been raised by the protests. He further testified that the protests involved about 75 percent or more of the irrigated land in the county, so the county board adjusted the valuations of that land and then, for the purpose of equalizing within the county, adjusted the values of land not specifically within the protests. There was also testimony that Banner County was not on the soil survey at that time but that the classifications of land within the county were reasonable. When asked under what statutory authority the board had proceeded, one official stated he believed it was Neb. Rev. Stat. § 77-1502 (Reissue 1986).

Following the hearing the Tax Commissioner notified the county that the commissioner would recommend the state board restore the values in the county to the values established by the 1986 land manual.

On August 11, 1986, the state board met to consider the recommendations of the Tax Commissioner. At that meeting representatives of Banner County presented testimony regarding the recommendations. At that hearing Jerry Knoche, an appraisal manager in the property tax division of the Department of Revenue, testified the department had used the number of total agricultural acres in Banner County to calculate land values. He testified the factor used by the county as part of the formula to adjust the individual class yields for each crop with a 5-year average was incorrect because the county calculated its own averages rather than using the averages reported by the reporting services. It was his opinion the figures for the department were correct and the values established in the 1986 land manual reflected the actual value of irrigated land in the county. He also testified that 1985 Neb. Laws, L.B. 271, codified at Neb. Rev. Stat. § 77-201 (Supp. 1985) and Neb. Rev. Stat. §§ 77-112, 77-1330, 77-1343 to 77-1348, and 77-1358 to 77-1368 (Reissue 1986), required the use of the same formula to value different types of land and that

the county board had applied two different formulas to value land in the county. Knoche testified a perimeter study of Banner County had been done which illustrated the disparities in classification which occurred because Banner County is not on the soil survey. It was his opinion the same type of land in Banner County was valued differently than land in adjoining counties because the land in Banner County is not correctly classified. He also testified the adjustments made by Banner County created more disparity between that county and adjoining counties.

Knoche testified that prior to the implementation of L.B. 271, a "feathering process" had been used between counties, but that procedure was no longer in use. The state then argued that the formula had not been shown to be arbitrary, capricious, or contrary to law, and was required by law to be used to determine the actual value of agricultural land in the state.

Stoddard reiterated the method she had used to recalculate the figures and stated she had used the total number of acres of irrigated cropland rather than harvested acres. Knoche then testified that harvested acres were used by the department to determine the average by the statistical reporting service and to obtain the different percentages of crops in the crop mix. He also testified that the formula used by the state accounted for all of the acres stated in Banner County's abstract. He then testified that dryland was treated differently; the price had been cut in half to allow for the summer fallow situation. He later testified the statutes require the use of yield average as reported by the crop reporting service, and that office has stated "the only yield they have is on harvested acres."

Tom Gillaspie, an attorney for the Department of Revenue, stated that it was his belief the board made the adjustments pursuant to § 77-1502 and Neb. Rev. Stat. § 77-1504 (Reissue 1986). It was his belief that L.B. 271 "does create actual value in the county and in that instance that 1502 [sic] for the board to determine something other than actual value is beyond their scope." As for § 77-1504, Gillaspie stated that the question is how to determine what values can be compared to assessments to determine whether property is over- or under-assessed. He

stated that § 77-112 now says actual value for agricultural land is to be determined separately and that § 77-201 says actual value equals the results obtained by the use of the formula. He further stated L.B. 271 restricts the ability of county boards to adjust assessments.

The state board found the county board had acted outside the scope of its authority by adjusting only the actual value of irrigated land in the county to achieve equalization within the county and between the surrounding counties. The state board specifically found the use of the statutory formula achieves actual value of agricultural land; therefore, the county's use of different calculations for irrigated land and dryland resulted in inequality between the classes. The state board further found it is the only body empowered to equalize valuations between counties. The state board then ordered the restoration of values established pursuant to the 1986 land manual and declared the adjustments previously made by the county board null and void. This appeal followed.

Banner County's position is that it followed the statutes in adjusting the value of the irrigated cropland and used the methods prescribed and authorized by the statutes. Banner County does not contend that L.B. 271 is unconstitutional and does not seek such a declaration. Banner County seeks only to set aside the action of the State Board of Equalization and Assessment and reinstate the action of its county board of equalization.

The county has set forth six assignments of error. The county contends the state board erred in finding that the county board did not have authority to adjust irrigated land values in the county; in finding that the factors within the statutory formula converting the estimated individual class yields for each crop were properly calculated for the county; in finding that the formula established actual value in the county; in finding that the valuations established pursuant to the land manual equalized values between counties; in finding that the state board was bound by the formula in the land manual in determining equalization between the counties; and in ordering the increase of valuations for 1986.

The state board seeks affirmance of its order, contending

that the county board clearly acted outside the scope of its authority, that the evidence supports the order of the state board and the county has failed to show such action was arbitrary or capricious, and that the state board has a statutorily imposed duty to equalize valuations of all property in the state.

The dispute concerns the adjustment of values of irrigated cropland by Banner County from those set by the application of the 1986 land manual formula. The original land manual values and adjusted values are as follows:

Irrigated Classification Subclass	Land Manual Value Per Acre	Adjusted Value Per Acre
2A	$565	$425
3A1	490	365
3A	435	325
4A1	355	265
4A	275	205

The original values were determined by applying the formula provided by the Nebraska Agricultural Land Valuation Manual, issued in accordance with L.B. 271.

Prior to the passage of L.B. 271, agricultural land was valued by county assessors using manuals provided by the Nebraska Department of Revenue. This practice used earning capacity of the property as the sole criterion for determining land value and resulted in the undervaluation of agricultural land in comparison with other real property. Comment, *Nebraska's "Mysterious" New Tax Valuation System: L.B. 271, the Agricultural Land Valuation Law*, 19 Creighton L. Rev. 623 (1986).

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the Nebraska Constitution requires that all tangible property be taxed uniformly and proportionately. We there stated it would be permissible to

> reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property. . . . [H]owever, the

> results obtained by such permissible different methods must be in some way correlated so that the results reached shall be uniform and proportionate and shall not exceed actual value.

Kearney Convention Center, supra at 302, 344 N.W.2d at 625.

The Nebraska Department of Revenue then revised the land manual, which resulted in an increase of approximately 60 percent in the assessed value of agricultural land. 19 Creighton L. Rev. 623, *supra*. The increase was due to the infusion of market value as a part of the formula used to value the land. *Id.*

In 1984 the Legislature proposed an amendment to Neb. Const. art. VIII, § 1. This amendment, commonly referred to as amendment four, was adopted by the voters at the November 6, 1984, election. 19 Creighton L. Rev. 623, *supra*. The proposition on the ballot stated, "A constitutional amendment authorizing the Legislature to separately classify agricultural and horticultural land." L. Res. 7, 88th Leg., 1st Spec. Sess. (1984). The amendment added the following language to art. VIII, § 1: "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation."

Before submitting the amendment four proposal to the voters, the Legislature rejected a proposal to amend the Constitution by repealing the uniformity clause. See L. Res. 1, 88th Leg., 1st Spec. Sess. (1984) (indefinitely postponed in committee). See, also, Note, *Separate Property Tax Classification for Agricultural Land: Cure or Disease?*, 64 Neb. L. Rev. 313 (1985).

Article VIII, § 1, also contains a clause which states that the value of land actively devoted to agricultural use shall be valued with regard to the value such land has for that use. That clause was added by amendment in 1972. 64 Neb. L. Rev. 313, *supra*. Subsequent to this amendment the Legislature added statutory language providing for a "greenbelt" special tax assessment on certain land to relieve urban fringe farmers of the tax burden caused by the speculative land value of the property for development. *Id.*

In 1985 L.B. 271 was enacted to implement amendment four,

and it resulted in several statutory modifications concerning the valuation of agricultural land.

Section 77-201 (Reissue 1981) had provided in part: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value."

Section 77-201 (Supp. 1985) provides:

> Except as provided in sections 77-1358 to 77-1368, all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made.

Section 77-112 now provides:

> (1) Except as provided in subsection (2) of this section, actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.
>
> (2) The term actual value when applied to agricultural land . . . for purposes of taxation shall mean that value determined pursuant to sections 77-1358 to 77-1368.

Section 77-1358 states the legislative findings upon which L.B. 271 was premised. The Legislature found amendment four authorized the placement of agricultural and horticultural land into a separate class for the purpose of taxation. § 77-1358(1). The Legislature further found a different valuation system for such land was required for various stated reasons and that such a valuation method should be based on the earning capacity of such land. § 77-1358(2)(e). The earning capacity method "shall be rationally based on accurate crop yields, prices, and patterns, expenses, and rate of return data. The method shall use nominal interest rates and average income data in order to maintain the historical valuation relationship between

agricultural land . . . and all other real property." § 77-1358(3).

Section 77-1359 defines the terms agricultural and horticultural land, and § 77-1360 sets out the qualifications for small tracts which are to be assessed as agricultural lands. Section 77-1361 provides that agricultural and horticultural land, used solely for those purposes

> shall constitute a separate and distinct class of property for purposes of property taxation. For tax year 1986, and each year thereafter, agricultural land and horticultural land shall be valued using the agricultural land valuation manual issued by the Tax Commissioner pursuant to section 77-1330 which shall be developed using the methods prescribed in sections 77-1358 to 77-1368.

Section 77-1330 requires the Tax Commissioner to prepare and annually revise guides to be used by county assessors for all appraisals and reappraisals of property. The section further provides that when, upon review by the Department of Revenue, it becomes apparent that a county has

> failed or neglected to implement any guide prescribed or issued pursuant to subsection (1) of this section, the Tax Commissioner may, after a notice and hearing conducted in accordance with Chapter 84, article 9, order whatever corrective measures the Tax Commissioner deems necessary to secure compliance with subsection (1) of this section.

The wording of this section was not changed by L.B. 271 from its previous language.

Section 77-1362 prescribes the method to be used by the Tax Commissioner to determine the actual value of agricultural land for taxable years beginning in 1986. The method requires

> (a) [d]ividing agricultural land . . . into major use categories and such categories into subclasses based on soil classifications; (b) computing a typical income stream based on historical gross receipts and landowner share determined using the method described in section 77-1364; and (c) dividing the derived income stream by a capitalization rate determined using the method described in section 77-1365.

Subsection (2) of that section provides that the land manual

> shall contain allowances to adjust actual values for irrigation costs and land productivity cost variations. Adjustments shall be based on empirical data and apply to areas with uniform characteristics which are within or which cross county lines. Upon written application to and approval from the Tax Commissioner a county assessor may apply such adjustments to specific parcels of agricultural land and horticultural land. No other site specific adjustments shall be made. The provisions of this subsection shall be strictly construed to maintain the concept of statewide mass appraisal of agricultural land and horticultural land.

Section 77-1363 divides agricultural and horticultural land into five categories: irrigated cropland, dryland cropland, pasture, rangeland, and wasteland. Each category is to be divided into subclasses based on soil classification standards, and county assessors are required to utilize and implement soil surveys in the tax year after they become available.

Section 77-1364 states in part: "Income streams for irrigated and dryland cropland shall be computed by multiplying gross receipts by landowner share by county." Gross receipts are to be computed "by multiplying the most recent five-year average price of a crop by the most recent five-year average yield of a crop and weighting the result by the most recent five-year average cropping pattern." Crops included are enumerated in the statute. Such data are to be taken from the Nebraska Crop and Livestock Reporting Service (NCLRS) or other state or federal agencies. Landowner share is defined as the proportion of the gross receipts less landowner expenses paid to the landowner. Methods for determining values for the other categories of property are also set out in this section.

Section 77-1365 sets out the method to be utilized in establishing the capitalization rate. There are two components in the rate: the debt portion and the equity portion, which are based on the relative proportion of real estate debt to farmer equity for the farm sector in the state. The proportions are set at 20 percent debt and 80 percent equity for 1986. After January 1, 1987, those amounts may be adjusted.

The percentage of debt is then multiplied by a number equal

to the most recent 5-year average of the Federal Land Bank interest rates in the Omaha district, resulting in the weighted debt capitalization rate. The number representing owner equity is then to be multiplied by the most recent 5-year average of 6-month U.S. Treasury bill interest rates, resulting in the weighted equity capitalization rate.

The numbers yielded by those computations are then added together to obtain the appropriate capitalization rate.

Section 77-1366 creates the Agricultural Land Valuation Advisory Board. Section 77-1367 sets out the board's duties, which include reviewing the land manual, reviewing data sources, and generally overseeing revisions of the land manual. Section 77-1368 provides that a new manual must be prepared when the actual value of agricultural land in any crop reporting district exceeds 105 percent or is less than 95 percent of the actual value of such land as determined using the most recent land manual.

Banner County first contends the state board erred in finding the county board was without authority to adjust the values of irrigated land to achieve intracounty equalization. The county argues the state board erred in holding that (1) "the use of the uniformly applied formula is deemed to achieve actual value of agricultural land" and that (2) "equalization of these classes has not been achieved because different calculations were used to value irrigated land and dryland."

The county board contends it had the authority to adjust the values because the statutes setting forth the duties and procedures of county boards with regard to the equalization of property values, §§ 77-1502, 77-1504, and Neb. Rev. Stat. § 77-1506.02 (Reissue 1986), were not affected by the enactment of L.B. 271. The county board further contends this power was not affected by § 77-1361, arguing that provision applies only to county assessors. As further support for its position, the county board has pointed out that an opinion of the Attorney General issued on June 12, 1980, stated that the county board was not forbidden to depart from the manuals prepared by the Tax Commissioner or from exercising its normal equalization functions. It further stated: "[W]e would not hold that the County Board . . . was without power to

depart from the manuals unless compelled by unequivocal statutory language, because such a construction would, in our opinion, render the statute constitutionally suspect, as denying property owners due process of law." Op. No. 296, Rep. of the Att'y Gen. of Neb. 427, 428 (1979-1980).

The county further argues the statutes are not inconsistent and that the enactment of L.B. 271 did not repeal them by implication because the new statutes are not repugnant to the old, nor is there a mandated legislative intent to deny the county boards such authority. The county also argues the state board's finding that the use "of the uniformly applied formula is deemed to achieve actual value of agricultural land" means, in essence, the county board was without authority because the answer to questions regarding assessments must always be supplied by the "uniformly applied formula."

The state board contends the county board failed to comply with the notice requirements of § 77-1506.02, and the resolution does not state the adjustments made were considered to be a percentage adjustment. The state board argues that since a county board can exercise only such powers as are expressly granted by statute and that since such statutes are to be strictly construed, the county board acted outside the scope of its statutory authority in making the adjustments. The state further argues the county board's apparent reliance on § 77-1502 is also misplaced because that statute applies only to protests with respect to individual parcels of property, rather than countywide adjustments of entire classes of property. The state board argues the county board can only accomplish such an adjustment through § 77-1506.02.

The state board further argues that the county board's actions were outside the scope of its authority even if it had complied with the statutory requirements for taking action. The state board argues that although characterized as an attempt to achieve intracounty equalization, the county's action was in reality an attempt to equalize values between counties. The state board contends the sole basis presented by the county for its reduction in irrigated cropland values was the perceived disparity between such values in Banner County as compared to surrounding or neighboring counties. The state board contends

there is no evidence indicating the values for such cropland, as determined by the 1986 land manual, resulted in a lack of uniformity or equalization within the county.

The first issue is whether the county board had statutory authority to reduce the assessed values of irrigated cropland within Banner County. The authority and duties of the county board are set forth in Neb. Rev. Stat. §§ 77-1501 to 77-1515 (Reissue 1986). These statutes were not specifically amended or modified by L.B. 271.

At the hearing before the state board, there was evidence that the county had relied on §§ 77-1502 and 77-1504 in taking its action, and no question was raised as to the county's compliance with these sections. Further, there was evidence that the county had met the requirements of both sections. The county board heard the protests pursuant to § 77-1502 and then used the evidence obtained in the protest hearings to equalize values of irrigated land throughout the county.

Section 77-1504 empowers the county board to

> equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low and lowering the valuation of such tracts and lots as are assessed too high. In cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, it may consider and correct the same by raising, after due notice has been given to the interested party or parties, or by lowering the actual valuation of such real property.

The record shows the county board followed the statutory requirements in decreasing the valuations at issue.

The next issue is whether the county board acted within its authority by considering the values of land in adjoining counties. The record shows that Banner County officials were concerned about some of the calculations to be used in the 1986 land manual prior to its completion. Following the use of the land manual to value property within the county, the board held hearings on the matter in April 1986, formal protests were subsequently filed, and a formal protest hearing held. The board considered evidence presented by landowners concerning the actual value of the land and also considered evidence that

the valuations for irrigated land were considerably lower in adjoining counties. The comparison with other counties was made after the board had recognized there was a problem with the valuations and had independently investigated. The county board adjusted the value of irrigated land within the county to achieve the actual value of such land. Such action is within the authority of the county board. §§ 77-1502 and 77-1504.

Banner County next contends the adjustments it made were appropriate to determine the valuation of irrigated land. The county has 21,192 acres of irrigated cropland. The Department of Revenue, in the 1986 land manual, utilized reported harvested acres, representing 16,584 acres, as the basis of its formula. The department later accounted for the remaining 4,608 acres by assuming the acres were planted to the same crops with the same average yields as the first 16,584 acres, and this assumed yield and crop pattern was then applied against the land manual area estimates of soil productivity grouped into land valuation groups and valued. The county used the SCS estimates of yield with minor adjustments applied to a similar array of cropping practices. The basic difference is that the county used SCS estimates to determine yields while the state used the NCLRS estimated yields.

The county contends its calculations are more accurate because the outcome of the formula will vary greatly depending on the assumptions made regarding cropping patterns. The county further contends its calculations take into consideration the productivity of the soil and are consistent with the values for similar land in adjoining counties.

The state board argues the county has not met its burden of proof to show the action by the state board in setting aside its adjustments was erroneous, arbitrary, or capricious. The state board further argues there is sufficient evidence in the record to sustain its findings and order.

In support of its position the state board argues that L.B. 271 provides the actual value of agricultural land is to be determined by the earning capacity valuation method. The state board contends the department presented evidence this method was rationally and correctly computed in the land manual and correctly determined the value of irrigated land in

Banner County for the 1986 tax year, and therefore, that value represents the actual value of the land. The state board further contends the county's calculations were incorrect.

This is a case of first impression before the court; the first case involving the application of the statutes codifying L.B. 271.

The state Constitution requires that taxes be levied "by valuation uniformly and proportionately upon all tangible property" except motor vehicles. The constitutional amendment upon which L.B. 271 is based, amendment four, permits agricultural property to be treated as a separate class for purposes of property tax. The amendment did not repeal the uniformity clause.

The Constitution, as amended, must be read as a whole. *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980). In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.

When amendment four was submitted to the voters it did not contain a proposal to repeal the uniformity clause. Such a proposal (L. Res. 1) had been introduced, considered, and rejected. Accordingly, the uniformity clause remains in effect unless the amendment necessarily conflicts with it. *Cunningham v. Exon*, 207 Neb. 513, 300 N.W.2d 6 (1980).

Generally, " 'A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.' " *Swanson v. State*, 132 Neb. 82, 94, 271 N.W. 264, 271 (1937). In construing a constitutional provision which limits legislative power, when the language of the provision is explicit, the court is bound to find the intent of the Legislature in the words of the provision itself, and not hold that something different from what the words provide was

intended.

Applying those rules in this case, we find amendment four does not conflict with the uniformity clause. Although both relate to the taxation of property, the provisions were not adopted for the same purpose and can be enforced without substantial conflict. The uniformity clause requires that all tangible property be taxed uniformly and proportionately, while amendment four merely permits the Legislature to place agricultural land in a separate class for tax purposes, permitting the valuation of such land by a different method.

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 302, 344 N.W.2d 620, 625 (1984), we stated:

> [I]t is permissible to reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property. To comport with our Constitution's requirement that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property," however, the results obtained by such permissible different methods must be in some way correlated so that the results reached shall be uniform and proportionate and shall not exceed actual value.

Since amendment four did not repeal the uniformity clause, expressly or by implication, the two clauses must be read in such a way as to give effect to both clauses. Thus, L.B. 271 must meet the requirements of both clauses to pass the test of constitutionality. Specifically, amendment four permitted the Legislature to classify property as a separate class, but the uniformity clause required the Legislature to treat that class in a uniform manner with other tangible property. This conclusion is supported by *Kearney Convention Center, supra*, wherein we stated that

> dry cropland, irrigated cropland, and all real estate, whether improved or not, are all tangible property of the same class for taxation purposes, as defined in our Constitution; and while such properties may be appropriately classified into logical subclassifications and different appropriate methods of determining values of such subclassifications may be utilized, the answers

> obtained as to the values of the various subclassifications of property must be correlated so that *all* tangible property shall be assessed uniformly and proportionately.

(Emphasis in original.) *Id.* at 303, 344 N.W.2d at 625-26.

Since the uniformity clause was not repealed, the Legislature can divide the class of tangible property into different classifications, but these classifications remain subdivisions of the overall class of "all tangible property," and there must be a correlation between them to show uniformity. Such a correlation is made by evidence that all tangible property has been uniformly assessed.

No evidence of such a correlation is present in the record before us or in the statutes implementing amendment four. In fact, our review of the statutes shows the correlation requirement was entirely disregarded. Section 77-201 now excepts agricultural land from being taxed at its actual value, but requires such taxation of other tangible property and real estate.

Section 77-112(1) defines actual value for tangible property and real estate as the value ascertained by using a formula containing seven different components to be considered as applicable to the property in question. Subsection (2) of that section provides that the actual value of agricultural land is the value obtained by the application of the earnings capacity formula set forth in §§ 77-1358 to 77-1368.

These sections provide for the separate classification and valuation of agricultural property and are consistent with amendment four. Conspicuously absent from these statutes, however, is a requirement that the resulting values obtained for agricultural land be correlated with the values obtained for other real property, as required by the uniformity clause.

These statutes have the effect of permitting the Legislature to do indirectly what it is prevented by the Constitution from doing directly—the taxation of agricultural land in a nonuniform manner from the taxation of other tangible property. This finding is also supported by § 77-1358(3), which states the 1986 land manual valuation method is designed to "maintain the historical valuation relationship between agricultural land . . . and all other real property." The historical

relationship between such properties in this state is the undervaluation of agricultural property as compared to other real property.

Since the uniformity clause which requires property taxes on all tangible property to be uniform has not been repealed, the Constitution cannot be circumvented by statutes which permit the nonuniform taxation of agricultural land. Since the issue is not presented, we do not undertake to determine whether a Nebraska constitutional amendment permitting land which produces income by raising crops to be taxed differently than land which produces income by other means would violate the U.S. Constitution. See *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923).

In reversing the order of the county board, the state board found the board had exceeded its authority in adjusting the value of irrigated land because the state board found that use of the land manual formula achieved actual value. This finding is erroneous because it permits agricultural land values to be determined without any requirement that the resulting values be correlated to ensure uniform taxation. The purpose of L.B. 271 appears to have been to preserve the historic undervaluation of agricultural land in comparison to other tangible property, a goal inconsistent with the uniformity clause.

Further, the county presented evidence that the use of the land manual did not result in a determination of the actual value of irrigated land in the county.

There is a presumption that a county board has faithfully performed its duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Once such evidence is presented, the reasonableness of the valuation becomes one of fact based on the evidence, with the burden of showing such valuation unreasonable resting upon the appellant. *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). Such a presumption applies as well to action by the state board. See *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 134 N.W.2d 272 (1965).

The state board's order was contrary to the law because it

relied on statutes which failed to conform to the uniformity clause of the Constitution.

There is an additional issue raised by the parties as to the authority of a county board of equalization to adjust the values of land under the new land manual. The county board contends the boards retain their statutory authority as determined prior to L.B. 271 because such authority was not expressly repealed or repealed by implication. The state contends that L.B. 271 restricts the authority of the county boards and the state board in these matters to a determination of whether the land manual formula has been correctly applied, but has forbidden them from otherwise adjusting the valuation. The state board further contends the county board used a different method to value irrigated land than it had used for dryland, thereby violating the statutory requirement that all agricultural land be valued pursuant to the land manual.

Although there are certain statutes which apply to county assessors, for example, § 77-1362, L.B. 271 did not modify the statutes which empower the county boards and the state board to act. None of the new statutes contain provisions which specifically apply to those boards. Thus, L.B. 271 did not expressly modify the power of such boards to adjust assessments in the manner prescribed by statute.

It also appears that such statutes were not repealed by implication. The mandated intent of the Legislature in enacting L.B. 271 was to protect the agricultural sector from perceived difficulties in the taxation and valuation of such land. § 77-1358. To ensure such a result the Legislature stated such land would be valued on the basis of its earning capacity and "rationally based on accurate crop yields, prices, and patterns, expenses, and rate of return data." § 77-1358(3). This language indicates the necessity for accurate determination of the factors used in the land manual.

The review and adjustment by county boards and the state board of the factors utilized in the calculations made in preparing the land manual are not inconsistent with this intent if such action is taken to ensure actual value is obtained. The statutes providing for such review are not inconsistent with this goal, and accordingly, we find those statutes were not repealed

by implication. See *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

The state board's contention that the county board used a different method to value irrigated land than used for valuing dryland is also unpersuasive.

The disparity between the calculations arose out of the method used to determine average yield of each crop for the various subclasses of irrigated land within the county. Banner County took the total abstract irrigated acres for the county, determined the number of acres in each crop, and using the estimated average yields for each subclass as reported by the SCS, determined average yield per acre. The results obtained by this calculation were lower than those obtained by the department, which used the NCLRS average yield to factor the SCS estimated yields. Because the county used the SCS estimated yields without factoring them by the NCLRS average yields, lower yields resulted, which ultimately resulted in a lower valuation of the property.

Banner County argues its recalculation was necessary to obtain the actual value of irrigated land in the county. It contends the statute requires the use of average yields per crop, which are not available; therefore, assumptions must be made, and the assumptions made by the county were correct because the values obtained more nearly approximated actual value than did those obtained by the state board.

The state board contends the county's failure to use the NCLRS 5-year average yield and the properly factored SCS subclass yields is in direct violation of § 77-1364, which requires the use of the NCLRS 5-year average crop yield, and therefore the county's action was invalid as a matter of law.

Section 77-1364 provides as follows:

> Gross receipts shall be computed by multiplying the most recent five-year average price of a crop by the most recent five-year average yield of a crop and weighting the result by the most recent five-year average cropping pattern. . . . The *source* of cropping patterns and yields by county and prices by crop reporting district shall be as reported by the Nebraska Crop and Livestock Reporting Service *or as published by other state or federal agencies.*

(Emphasis supplied.)

Banner County used figures obtained from the crop reporting service which were sent to the counties by the state, but calculated yields by using the SCS estimated yields without factoring in the NCLRS 5-year average crop yields. Contrary to the state board's contention, § 77-1364 does not require that average crop yields or average cropping patterns be determined solely on the basis of the NCLRS, but states that source or any other source "published by other state or federal agencies" may be utilized. Therefore, the statute does not appear to require the exclusive use of the NCLRS figures, and the calculations made by the county are not invalid as a matter of law.

Our review of the record reveals the county had evidence that irrigated land in the county was overvalued because the valuations of such land increased by 54 percent after the implementation of the land manual. The board received protests as to the values, investigated, and found the land was assessed at a value higher than its actual value.

The county board then utilized the same statutorily required formula to value both irrigated and dryland cropland, but used the SCS estimates to determine the average yield for irrigated land because the board concluded the averages obtained by using the SCS estimates resulted in more accurate average yields per crop for irrigated land, and determined the amounts obtained for dryland were accurate. This was a relatively minor change which was permitted under § 77-1364, and it did not create disparity between the two classes of real estate in the county. Some evidence of the lack of disparity is the fact that the county received virtually no protests concerning the valuation of dryland.

Banner County argues its values are more accurate for the following reasons. First, maps included in the 1986 land manual illustrate the county has two significant areas of bluffs and escarpments and has areas of valley-sided slopes, while Kimball and Cheyenne Counties have only minor areas of bluffs and escarpments. Map 5 at page 10 of the land manual shows Banner County's and Kimball County's growing seasons are less than 2,400 degree days, with some portions having less than 2,200 degree days, while about half of Cheyenne County

enjoys more than 2,400 degree days overall, with some portions of the county having close to 2,600 degree days. Map 6 at page 11 of the manual shows Banner County receives less than 16 inches of precipitation annually, while Kimball is mostly above and Cheyenne overall above 16 inches. Map 7 at page 12 shows that Banner County has fewer freeze-free days than both counties.

Banner County then argues the figures in land manual area 1 illustrate the disparity in the county's valuations as compared to those of other counties as follows:

	Irrigated Land		
Subclass	Banner County	Cheyenne County	Kimball County
1A1	$710	$520	$420
1A	660	485	390
2A1	615	450	360
2A	565	405	325
3A1	490	350	285
3A	435	295	250
4A1	355	240	210
4A	275	185	165

In fact, the valuations in only three counties in land manual area 1 exceed Banner County's valuation as to subclass 2A1 land: Scotts Bluff County at $670; Dawes County at $635; and Sioux County at $650, while Banner County is $615. Only three counties exceed Banner County's valuation with regard to subclass 4A: Scotts Bluff County at $310, Dawes County at $310, and Sioux County at $385.

Banner County contends the state dismissed this argument at the hearing on the grounds the difference in classification was due to the dissimilarity of the classification between Banner County and its surrounding counties, because Banner County is not on the soil survey. However, Cheyenne County, one of the adjoining counties used for comparison purposes, also was not on the soil survey at that time.

Another problem raised by the department was that Banner County has only five classifications of irrigated cropland rather than the six recommended by the department. Banner County's

witnesses stated that the county had adopted only five classifications because there were fewer than 200 acres that would fall into either a 2A1 or 2D1 (dryland) classification, all of these acres being scattered throughout the county and not irrigated at the time of the conversion in 1979. Consequently, those acres were grouped into the lower dryland subclass. Banner County contends this grouping had no effect on the valuations of irrigated subclasses because it involves only 200 out of approximately 21,000 acres.

Banner County argues the perimeter study illustrates the validity of its position. That study shows that, comparing irrigated land to irrigated land, the values are as follows:

	Land Type	Land Manual Valuation	Adjusted Valuation
Banner County	3A	$435	$325
Kimball County	3A	250	——

The county argues that this is a comparison of values involving adjoining acres and that the perimeter study shows Banner County land is valued at a higher level of value than is Kimball County land along their mutual border.

The county further argues the average irrigated values presented by the department for Banner, Kimball, and Cheyenne Counties are very close to those developed by the county board.

The state board vigorously contends Banner County is incorrect. The state first contends it achieved the equalization of values because the same method of valuation was used in every county.

The state next contends the county improperly relied on the maps contained in the land manual because the maps are not detailed enough and reflect a 30-year trend, rather than the most recent 5 years as required by statute. The state also contends Banner County's comparison with other counties concerning subclass 2A1 land is irrelevant because it has no acres in that classification.

The state contends that due to the fact that Banner County's soil classification system is not the same as the other counties', the proper comparison to be made is to compare average

irrigated values and average irrigated crop yields from the counties being compared as follows:

		Average Irrigated Crop Yields Per Acre			
County	Average Irrigated Land Values	Alfalfa (tons)	Corn (bu.)	Dry Beans (lbs.)	Sugar Beets (tons)
Banner	380	4.36	113.80	1,822.20	22.17
Kimball	320	3.96	103.80	1,502.80	——
Cheyenne	350	4.24	117.80	1,651.20	20.29
Morrill	475	4.22	124.00	1,910.00	21.33
Scotts Bluff	610	4.44	126.20	1,950.00	22.59

The average value figures were taken from the map showing average irrigated values across the state, and the average yields are the NCLRS 5-year average crop yields taken from maps within the land manual.

The state argues this chart illustrates Banner County's land is reasonably valued. For example, all of Kimball County's crop yields are lower than Banner County's, and Cheyenne County's yields are lower in three of four crops, just as Banner County's are lower than Scotts Bluff County's. The state then argues that there are 200 acres known to be misclassified in Banner County, and possibly more. The evidence is, however, that only 200 acres were misclassified. The state also argues that since Banner County has only five subclasses of irrigated land, more value will be attributed to those subclasses. This argument can be illustrated as follows:

County	No. Subclasses	Land Manual Average Value Per Acre	Subclass Compared
Banner	5	$380	4A1
Cheyenne	6	350	3A1
Kimball	8	320	2A1

Based on this information, the state board argues in its brief that by using the land valuation by class chart and comparing Banner County's 4A1 (45 percent of all irrigated land in the county) value with Cheyenne County's value for 3A1 (45

percent of all irrigated land in the county) and Kimball County's value for 2A1 (28 percent of all irrigated land in the county) there was no equalization problem.

The state also contends the use of the perimeter study was improper because Banner County was not on a modern soil survey, while Kimball County was.

In reviewing the record, the following facts are apparent. First, the valuations at issue in this appeal pertain to subclasses 2A, 3A1, 3A, 4A1, and 4A. Banner County's valuations for those subclasses are higher than Kimball and Cheyenne Counties', as is illustrated in the chart detailing irrigated land subclass values above. The state argues a more accurate comparison of the three counties requires the comparison of the average values of irrigated acres, as illustrated in the chart above. The chart shows Banner County is valued at $380, Kimball County at $320, and Cheyenne County at $350. These figures illustrate Banner County's average irrigated land value is approximately 16 percent higher than Kimball County's and 8 percent higher than Cheyenne County's. The state further argues that a comparison of 2A1 land in Kimball County, 3A1 land in Cheyenne County, and 4A1 land in Banner County shows values of $360, $350, and $355, which are very similar values. This argument is not persuasive because those values account for only 28 percent of irrigated land in Kimball County, but 45 percent of such land in Cheyenne and Banner Counties.

Further, it is not a comparison of similar classifications of land because neither Banner nor Cheyenne County was on a modern soil survey at this time, while Kimball County was. The state had argued previously that the county was precluded from using such comparisons for that very reason.

Perhaps the best evidence of the actual value of the land was the perimeter study. It shows there is a disparity in the valuation of adjoining land between Banner and Kimball Counties for subclass 3A land in that Banner County was valued at $435 according to the land manual, while Kimball County was valued at $250. Banner County's value was still higher after the county board's adjustment, at $325. This evidence was properly introduced to show the valuation of adjoining lands in the two counties. The state's argument that the use of this study was improper because Banner County was not on the modern soil

survey is unpersuasive because there was evidence the adjoining land was of the same type; therefore, the valuations should have been similar, even though classified differently, because the law requires the uniform valuation of similar property.

We conclude the state board's action negating the action of the county board was contrary to law. The evidence presented by Banner County showed the value of irrigated land had been set by the land manual at an amount higher than its actual value and that the adjustments made by the county board correctly established the land's actual value.

The order of the State Board of Equalization and Assessment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF C.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.C., APPELLANT.

411 N.W.2d 51

Filed August 14, 1987. No. 86-885.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. _____. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Juvenile Courts.** As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct

the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Christine P. Costantakos, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

T.C., the biological father of C.C., appeals from an order of the separate juvenile court of Douglas County terminating his parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984) for failure to correct conditions leading to the adjudication that C.C. is a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986).

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987); *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra*. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the

Nebraska Juvenile Code. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J. W., supra.*

In re Interest of T.C., ante p. 116, 117-18, 409 N.W.2d 607, 609 (1987).

On March 13, 1984, the State filed a petition and alleged that C.C., who was born on June 13, 1983, was a juvenile within the meaning of § 43-247(3)(a) (Cum. Supp. 1982) because C.C. lacked proper parental care by reason of the faults or habits of her parents. The petition contained the following allegations:

> A. On February 28, 1984, said child was admitted to the hospital suffering from a bilateral subdural hematoma, which required subdural taps; said injuries occurred while said child was in the custody of [C.C.'s parents]; said parents offered several inconsistent reasons for the injuries suffered by said child.
>
> B. [C.C.'s parents] have failed to make said child available for necessary cleft palate surgery and other medical needs of said child after having been advised by medical personnel of the urgency for said treatment and care.
>
> C. [T.C.] has admitted to violent shaking of said child, on several occasions; [C.C.'s mother] has failed to protect said child during these episodes and has continued to leave said child in the sole custody of [T.C.] being fully cognizant of his violent nature.
>
> D. [T.C.] has failed to seek or make himself available to the mental health care prescribed and/or recommended for him; [T.C.] has admitted to a violent temper and his need for therapy or counseling.
>
> E. [T.C.] has, on several occasions, physically assaulted [C.C.'s mother] in the presence of said child; [C.C.'s mother] has expressed a fear of [T.C.] because of his temper.

At the adjudication hearing, held on March 22, 1984, C.C.'s parents appeared before the court with their lawyer. Also, the guardian ad litem for C.C. appeared at the adjudication hearing. C.C.'s parents entered their pleas of "no contest" to the petition. The juvenile court found that C.C. was a juvenile within the meaning of § 43-247(3)(a) and continued the

proceedings until a dispositional hearing. On May 30, 1984, C.C.'s parents appeared before the court with their attorney for the dispositional hearing. The guardian ad litem for C.C. and a representative of the Nebraska Department of Social Services also appeared for the dispositional hearing. Evidence presented at the dispositional hearing disclosed that the father, T.C., had many problems, such as impulsivity, drug abuse, coping with stress, and urges of violence. T.C. was described as a person who is aggressive, violent, and manipulative and as an individual in desperate need of professional psychological help. A psychological evaluation indicates that T.C. has an antisocial personality, that is, he is prone to impulsive, explosive acts and has a history of drug dependence. The father has had several residences apart from the child and her mother. Psychological evaluation also revealed that C.C.'s mother is functioning at the borderline retarded area of intelligence. Evidence further disclosed that C.C. has a number of conditions which require special attention, including Waardenburg's syndrome, a musculoskeletal abnormality; an orthopedic and nervous disorder; a cleft palate, which required surgery; conducive hearing loss requiring a hearing aid; and a heart murmur and breathing condition, which required C.C. to be placed on an apnea monitor. At 9 months of age, C.C. suffered a bilateral subdural hematoma as a result of trauma to C.C.'s head. Prior to C.C.'s receiving that head injury, C.C. had quit breathing, to which T.C. responded by shaking her vigorously instead of administering CPR as he had been instructed. T.C. also disclosed another incident of head trauma, occurring prior to the preceding incident, when he placed C.C. on a table, left her unattended, and she fell on the floor, severely bruising her head.

At the conclusion of the dispositional hearing, the juvenile court, in addition to certain rehabilitative measures for the parents, ordered that C.C.'s parents take the Infant Stimulation Program at the Meyer Children's Rehabilitation Institute and receive parenting instruction. The court then ordered that temporary custody of C.C. would remain with the Nebraska Department of Social Services until C.C.'s parents complied with the plan to correct the conditions leading to the finding

that C.C. was a juvenile within the meaning of § 43-247(3)(a). Subject to supervision and monitoring by the Meyer Children's Rehabilitation Institute, C.C.'s parents were granted the reasonable right of visitation of C.C.

Following the dispositional hearing, review hearings were held in September of 1984 and March of 1985. During this period, T.C. had not been in compliance with the court's order regarding participation in the Infant Stimulation Program and had missed a number of his scheduled appointments. Although T.C. had complied with the order to be evaluated by Nebraska Psychiatric Institute, following his diagnosis disclosing marijuana and other drug abuse, T.C. refused to participate in any followup therapy, but continued to use marijuana. In March of 1985 T.C. had yet to maintain independent and separate housing and had no "workable income" at that time. The juvenile court then reaffirmed its order regarding T.C.'s compliance with the rehabilitation plan and set the matter for subsequent review hearings. Two hearings in 1985 and one in May of 1986 also disclosed that T.C. had yet to comply with the court-ordered rehabilitation plan.

Based on § 43-292(6), a motion to terminate parental rights was filed on June 4, 1986, alleging that T.C. had failed to comply with the plan for rehabilitation ordered by the court on May 30, 1984, that is, T.C. had visited C.C. on only 30 percent of the scheduled visits, had failed to maintain involvement in the Infant Stimulation Program through the Meyer Children's Rehabilitation Institute, had not pursued the recommendations of the Nebraska Psychiatric Institute, and had failed to maintain independent and separate housing and adequate income.

A hearing on the motion to terminate parental rights was held on August 6, 1986. Throughout the 2-year period of time during which this matter was pending before the juvenile court, T.C. was repeatedly admonished regarding compliance with the provisions of the rehabilitation plan ordered by the court. However, as shown by evidence at the August 6 hearing, T.C. had not completed participation in the Infant Stimulation Program. Jessie Rasmussen, a parent-infant educator for Meyer Children's Rehabilitation Institute, testified that,

beginning in September of 1984, T.C. was scheduled for bimonthly 1-hour sessions of training and instruction in view of C.C.'s disabilities. Rasmussen explained the importance of attendance at the sessions so that T.C. could obtain the necessary instruction to assist C.C. with physical and speech therapy, which was necessary because of C.C.'s condition. However, T.C. attended only 4 of the 13 scheduled sessions from September of 1984 through February of 1985 and discontinued participation in the program. Since October of 1984, when T.C. separated from C.C.'s mother, T.C. had the opportunity to be with C.C. during 80 scheduled visits. Of the 80 scheduled visits, T.C. visited C.C. on only 29 occasions, citing massive depression, drug withdrawal, and transportation problems as excuses. Further, throughout the entire proceedings, T.C. failed to maintain independent housing, and his employment history indicated that he was sporadically employed and rarely held a job for a period of time greater than 1 month.

Although T.C., as ordered by the court, had started individual and group therapy in view of T.C.'s psychiatric problems and drug dependency, he was terminated from two programs for lack of attendance and claimed he was unable to pay for therapy at the Nebraska Psychiatric Institute. Carol Citta, an employee of the Nebraska Department of Social Services, testified that she explained to T.C. how he could apply for free psychiatric treatment and care at the Nebraska Psychiatric Institute, but that T.C. failed to follow through with the application process, as he felt he really did not need psychiatric attention. Further, Citta testified that transportation was made available to T.C., and T.C. acknowledged that he had other means of getting to and from his scheduled appointments. The court found that the allegations that T.C. had failed to comply with the court's rehabilitation plan were true and that, in the best interests of C.C., the parental rights of T.C. should be terminated.

Following the termination order, T.C. filed a motion for new trial, alleging that newly discovered evidence, namely, that T.C. secured a job and separate housing subsequent to the hearing for termination of parental rights, required that the court grant

his motion. The motion was denied, and T.C. maintains on appeal that the juvenile court was in error in finding that T.C.'s lack of compliance with the court-ordered rehabilitation plan was established by clear and convincing evidence. T.C. further maintains the juvenile court erred in overruling his motion for new trial.

As we recently stated in *In re Interest of T.C., ante* p. 116, 121-22, 409 N.W.2d 607, 611 (1987):

> As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. See *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). Cf. § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication).
>
> As expressed in *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984): "The mother has failed to rehabilitate herself, notwithstanding the [court's] order and programs directed to rehabilitation. When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require a final disposition be made without delay."

The program for T.C.'s rehabilitation was designed for appropriate parental care for C.C. and her basic needs. In view of T.C.'s personality problems, a plan providing for therapy was reasonable under the circumstances. The needs of C.C. require both emotional and some financial stability and support, as well as parental desire to care for and assist C.C., a disabled child. T.C., by his actions, has shown no indication that he will provide such support. We find clear and convincing evidence that T.C. failed to comply with the rehabilitative program ordered by the juvenile court and that T.C. has not corrected the conditions leading to the adjudication that C.C. was a juvenile under § 43-247(3)(a). Therefore, termination of parental rights is proper under the circumstances.

Finally, regarding T.C.'s motion for a new trial, we note that "the granting or refusal of such a motion for a new trial is left to the sound discretion of the trial court, and in the absence of an

abuse of that discretion the determination will not be disturbed." *State v. Donnelson*, 225 Neb. 41, 53, 402 N.W.2d 302, 310 (1987). " 'Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence.' " *Martinez v. Peterson*, 212 Neb. 168, 173, 322 N.W.2d 386, 389 (1982). See Neb. Rev. Stat. § 25-1142 (Reissue 1985). We find no abuse of discretion by the juvenile court in denying T.C.'s motion for a new trial. Accordingly, after our de novo review of the record, we affirm the juvenile court's order terminating the parental rights of T.C.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY C. COTTINGHAM, APPELLANT.

410 N.W.2d 498

Filed August 14, 1987. No. 87-012.

1. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
2. **Motions for New Trial.** New evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome.
3. **Criminal Law: Judgments: Evidence: Appeal and Error.** Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
4. **Trial: Witnesses: Appeal and Error.** In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
5. **Ordinances: Judicial Notice: Appeal and Error.** Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

James R. Place and Alan M. Thelen of Breeling, Welling & Place, for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and Richard M. Jones, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

The defendant, Jeffrey C. Cottingham, appeals from an order of the district court for Douglas County affirming the defendant's conviction and sentence in the county court for Douglas County of one count each of assault and battery, a violation of Omaha Mun. Code, ch. 20, art. IV, § 20-61 (1980); indecent exposure, a violation of Omaha Mun. Code, ch. 20, art. V, § 20-114 (1980); disorderly conduct, a violation of Omaha Mun. Code, ch. 20, art. III, § 20-42 (1980); and damage to property, a violation of Omaha Mun. Code, ch. 20, art. VI, § 20-158 (1980). On appeal, the defendant alleges the trial court erred in failing to sustain defendant's motion for new trial and for writ of error coram nobis, in failing to properly sequester the State's witnesses, in finding the evidence sufficient to support a conviction of indecent exposure, and in rendering excessive sentences. For the reasons hereinafter stated the order of the district court is affirmed.

The record shows that during the early morning hours of January 4, 1986, Timothy Darby and Jacqueline Avard, the complaining witnesses, were proceeding through the drive-through facilities of a Burger King restaurant in Omaha, Nebraska, in a car owned by Avard and being driven by Darby. As the witnesses were ordering their sandwiches, a car owned by the defendant and being driven by a companion pulled into the drive-through lane directly behind the witnesses' car. The defendant then got out of the car in which he was a passenger, unzipped his pants, and urinated on the drive-through lane. This behavior was observed by Darby, Avard, and Scott Gavin, an employee of the restaurant. Darby verbally objected to defendant's action and suggested there were other places where one could go to the bathroom. An exchange of comments

ensued as the two cars proceeded through the drive-through lane. Darby and Avard received their sandwiches from the drive-up window and proceeded to the side of the building, where they parked to eat.

The vehicle in which defendant was riding was driven around the corner and parked next to the Avard vehicle. The State's evidence showed that defendant and his companion left their car and approached the driver's side of Avard's car. The defendant then began to strike Darby through the open window while his companion was holding Darby. Avard jumped from the car and screamed at the defendant to stop. Darby crawled out of the passenger's side of the car and approached the defendant to try to calm him down. At this point, the defendant and Darby began to fight. The defendant suffered a cut lip which eventually required stitches. During the course of this fight, the defendant went to his car and removed a large radio. Darby thought the defendant was going to swing the radio at him and ran inside the restaurant. Avard jumped back into her car, drove up to the restaurant's door, and joined Darby inside the restaurant. Defendant and his companion then came to the door and began shouting at Darby to come out and finish the fight. Darby did not go back outside, and the defendant and his companion began kicking and jumping on Avard's car. This attack on the car lasted approximately 3 to 4 minutes, during which the car received numerous dents and a broken antenna, resulting in $675 damage. At this time the manager of the Burger King phoned the police, and the defendant and his companion fled the scene. The defendant was subsequently arrested and charged with assault and battery, damage to property, disorderly conduct, indecent exposure, and littering. After a trial to the bench, the defendant was found guilty on all of the charges except littering, which was dismissed by the trial court on the basis that urinating is not littering. The defendant was sentenced to 30 days in the county corrections center on each count, the sentences to run concurrently. On appeal to the district court for Douglas County, the judgment and sentences of the county court were affirmed. It is from this order the defendant appeals to this court.

The defendant first assigns as error the trial court's failure to

sustain defendant's motion for new trial and for writ of error coram nobis. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). The new evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome. *State v. Donnelson, supra; State v. Koch*, 224 Neb. 926, 402 N.W.2d 275 (1987).

With regard to defendant's motion for writ of error coram nobis, we have held that such a writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949).

The evidence on which the motion is based includes affidavits from Brad Carpenter, the defendant's companion on the morning in question; the defendant's mother; the defendant's attorney; and the defendant himself. The latter three affidavits are concerned with the diligent efforts to locate Carpenter and secure his testimony prior to trial. Carpenter's affidavit is the only one which relates to the circumstances and events occurring on January 4, 1986. This proposed testimony of Carpenter would have been subject to the scrutiny of the court to the same extent as was the testimony of the other witnesses. We cannot say that the affidavit is of such a potent nature that it probably would have produced a different result. In fact, the affidavit of Carpenter conflicts, in some respects, with the defendant's own testimony at trial. In other respects, both the testimony of the defendant and the affidavit of Carpenter support an acquittal, and to that extent, the proposed testimony of Carpenter would have been cumulative. Defendant's first assignment of error is without merit.

The defendant next assigns as error the trial court's failure to properly sequester the witnesses. The defendant specifically objects to the court's failure to exclude testimony of the

plaintiff's witnesses after one of the witnesses testified with respect to an apparent conversation with other witnesses concerning the location of the vehicles in the parking lot. We have held that in order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice. *State v. Hess*, 225 Neb. 91, 402 N.W.2d 866 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). We find no showing of prejudice due to the sequestration order in the case at bar. The record of the voir dire examination of the witnesses shows there was a conversation with respect to the location of the vehicles. However, David Troia, one of the witnesses involved in the conversation, further testified that there was no discussion concerning a broken antenna, nor any discussion as to what else took place or who hit whom. Defendant's contention that the court erred in failing to properly sequester the witnesses is without merit.

The defendant further alleges that the evidence was insufficient to support a conviction of indecent exposure and that the trial court erred in imposing excessive sentences. The record shows that defendant was charged and sentenced under the Omaha Municipal Code. Our consideration of defendant's assignments of error on these matters requires an examination of the specific ordinances. Those ordinances have not been made a part of the record and are therefore not before this court. We have held that where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). We will not otherwise take judicial notice of the municipal ordinance. *State v. Lynch, supra; State v. Richter,* 221 Neb. 487, 378 N.W.2d 175 (1985); *State v. Austin,* 219 Neb. 420, 363 N.W.2d 397 (1985).

In the absence of the applicable Omaha municipal ordinances from the record, we must presume the evidence sustained the findings and the sentences were within the limits as set in the ordinances. From consideration of the facts set out above, it is difficult to say that four 30-day sentences, to be served concurrently, amount to excessive sentences. Defendant admits that "[t]hese sentences were within the range of

permitted sentences for the offenses . . . ." Brief for Appellant at 13. We will not further address the assignments of error relating to the ordinances under which the defendant was convicted and sentenced. The facts on these issues speak for themselves.

The district court reviewed the entire record of the county court in making its determination that there was no error in the record and that the judgment and sentences of the county court should be affirmed. We agree. The order of the district court, affirming the judgment and sentences of the county court, is affirmed.

AFFIRMED.

RICHARD K. TURNER, APPELLANT, V. DENNIS E. WELLIVER AND NEBRASKA ALL RISK CROP COMPANY, A CORPORATION, APPELLEES.

411 N.W.2d 298

Filed August 21, 1987. No. 85-328.

1. **Trial: Evidence: Appeal and Error.** Generally, the reception or rejection of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of exclusion of evidence, a clear abuse of discretion must be shown.
2. **Trial: Evidence.** Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
3. **Trial: Parties: Witnesses.** When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
4. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
5. **Trial: Rules of Evidence: Expert Witnesses.** If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
6. _____: _____: _____. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
7. **Trial: Directed Verdict: Evidence.** For purposes of a motion for a directed

verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.

8. **Libel and Slander.** In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer or speaker to give the information.
9. **Libel and Slander: Proof.** Where a qualified privilege exists, there can be no recovery without proof of malice.
10. **Libel and Slander: Words and Phrases.** Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
11. _____: _____. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
12. **Libel and Slander: Insurance.** Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
13. **Libel and Slander.** Generally, whether a publication was a privileged one is a question of law to be determined by the court.
14. **Libel and Slander: Liability.** Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
15. **Libel and Slander: Proof.** As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
16. **Libel and Slander: Words and Phrases.** Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
17. **Libel and Slander: Words and Phrases: Actions.** A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
18. **Libel and Slander.** A communication between those sharing a common interest is conditionally privileged.

Appeal from the District Court for Phelps County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

William H. Sherwood and Charles J. Cuypers of Sherwood & Cuypers, for appellant.

Jeffrey H. Jacobsen of Jacobsen, Orr & Nelson, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The plaintiff has appealed from the judgment of the district court, which sustained the defendants' motion for a directed verdict made at the close of all of the evidence. This was a trial for damages because of alleged libel and slander. Errors assigned may be stated as follows: (1) The court erred by making findings of fact, which was properly for the jury to do; (2) errors were committed by the court in its interpretation of the rules relating to the law of slander and libel; and (3) rulings of the court as to the admission or rejection of evidence were not supported by either the facts or the law.

Richard K. Turner, the plaintiff, purchased the General Service Agency, Inc., in Holdrege, Nebraska, in 1978. Prior to 1980, "all risk" crop insurance was available to farmers only through an agency of the federal government known as the Federal Crop Insurance Corporation (FCIC). In 1980, the Congress enacted a law which established a new marketing plan for all risk crop insurance whereby that insurance would be made available through master marketers, but it would still be underwritten by the federal government. Turner engaged in the sale of all risk crop insurance as an employee of the FCIC's McCook, Nebraska, office until about February of 1982, when apparently that agency discontinued direct writing.

In 1981, Turner employed Claude Evans as an agent, and later, in the fall of 1981, he and Evans formed a partnership, called T & E, which was designed solely to solicit and sell all risk crop insurance coverage. It was through Evans that Turner eventually met Dennis E. Welliver, in August of 1981. Welliver was lining up agents for Welliver's master marketing company, the Nebraska All Risk Crop Company, also known as NARCC. Turner did contract with NARCC in October of 1981 and placed his all risk crop insurance through that company.

According to Turner, when the McCook office of FCIC was closed in the early part of 1982 because the agency went to the master marketing plan rather than direct writing, he was given a list of policyholders by a Ross Smith, the then director of the

FCIC in McCook. It seems to be on this basis that Turner claims the insurance customers, whom we will later discuss, were his customers. However, according to the testimony of Welliver, the customers were Welliver's.

There seemed to be no dispute but that, at the time in question, in order for a person to sell federal all risk crop insurance that person had to be certified, after having taken certain tests prescribed by the federal government. Also, it is agreed that Evans was a certified agent while Turner was not. However, Turner could sell crop insurance through a reinsurance program, as distinguished from direct FCIC insurance through a master marketer. It was this latter program that Turner was following until the spring of 1983.

Turner testified that he decided sometime in 1983 to transfer his crop insurance from NARCC to some other company. However, in later, more specific testimony, he said that it was not until the first or second week of April of 1983 when he made a decision to transfer his crop insurance to Rain & Hail Insurance Service, which was a reinsurance program backed by Aetna Insurance Company. At about this same time, according to the testimony of Claude Evans, on April 28, 1983, Evans terminated his partnership of T & E with Turner. Although Turner testified at trial that the T & E partnership still existed, he had earlier, apparently at a deposition, testified that it terminated on April 30, 1983. Exhibit 17 was a statement given by Evans to Turner, which stated that Evans gave Turner his half of the partnership, T & E, provided all commissions then due Evans would be paid to him. Turner conceded that if the partnership were terminated it would have been necessary for him to have hired a certified agent in order to continue handling federal crop insurance through FCIC.

The occasion which precipitated the series of events resulting in the filing of this lawsuit was the mailing of a letter, exhibit 5, to the all risk crop insurance customers which Turner had placed with NARCC during the past year. The text of this letter is set out in full as follows:

April 21, 1983

Dear Insured:

It has been a privilege to handle your "All-Risk" Crop

Insurance business this past year. We hope we have served you well.

In the past our agency contracted your all-risk coverage through the Federal Crop Insurance Corporation's (FCIC) master marketing system. While the coverage was there, we encountered problems in servicing some of our customers, mainly because of delays in losses being processed, indemnity checks being delayed, and other "red tape" hassles.

In an effort to eliminate these problems, we have decided to contract our All-Risk Crop Insurance with Rain & Hail Insurance Service in Omaha. This company has been in business since 1920, and is financially sound, being backed 100% by Aetna Insurance Company for over 60 years, who in turn is backed by FCIC. Our agency has had Crop Hail business with this company for over ten years, and can vouch for their excellent service.

The rates and coverages provided will be identical to those you received with FCIC. We know we will cut out much red tape, and have more control in the adjustment of claims and when they are paid.

To transfer your account to Rain and Hail, we will need to send a transfer request and application to insure that your past FCIC experience will continue on with your new contract. Unless we hear from you to the contrary by April 28, 1983, we will assume you approve this transfer of your account, and will process the necessary forms.

If you have questions, or would like to discuss this personally, please feel free to call or stop in at our office.

Cordially,

GENERAL SERVICE AGENCY, INC.

RKT/CE/fl R. K. Turner Claude Evans

The mailing of exhibit 5 apparently prompted Welliver to send out to these same customers exhibit 1, a letter dated April 28, 1983. Two additional sheets were attached to that letter; one was a list of agents and agencies in the Holdrege area who were certified NARCC agents and the other a copy of a form 758 which, if the customer signed, would effect a cancellation of

any crop insurance issued to Turner's agency and a placement of this same insurance with Nebraska All Risk Crop Company. The letter included in exhibit 1 is set out in pertinent part as follows:

April 28, 1983

Dear Insured:

You just have received a letter from the General Service Agency, agents R.K. Turner and Claude Evans, requesting you to transfer your Federal All Risk Crop Insurance to Aetna Insurance Company. Please disregard and ignore.

To transfer your Federal "All Risk" Contract to any other company requires a signed request by you, not your signature written in by Mr. Turner. Mr. Turner has been instructed by the Federal Crop Insurance Corporation (FCIC) that they are returning all previous transfer requests submitted by Mr. Turner and are requiring your personal signature on each request. These requests have to be signed by you by April 30, 1983, to be effective for the 1983 crop year. Any backdating will be monitored very closely by FCIC.

This illegal letter is just a continuation of Mr. Turner's unethical insurance practices. Mr. Turner was investigated by the USDA's Office of Investigation a year ago for similar unethical insurance practices and now this illegal letter will probably prompt another investigation. We have been instructed by Mr. Evans that because of Mr. Turner's continued unethical practices, he is in the process of terminating his partnership with Mr. Turner and will be leaving the General Service Agency. We have reconfirmed Mr. Evan's [sic] intentions today.

In addition, if you do wish your contract to remain directly with FCIC you will not be allowed to leave your file with the General Service Agency. FCIC required all agents who write directly with Federal Crop Insurance to pass a certification test to handle Federal All Risk Crop Insurance for the 1983 crop year. Mr. Turner did not take the time and effort to even attend any of the eight FCIC offered certification training and testing sites across the state, thus enabling him to learn the new changes and

better serve your "All Risk" policy. The deadline for an agent to be certified is April 30, 1983.

Due to all of the above facts we are recommending you transfer to a qualified and FCIC certified agent in your area. If you wish to remain directly with FCIC you will have to transfer.

. . . .

If there are any questions, please call our toll free number 1-800-652-1937.

Sincerely,

/s/ Dennis E. Welliver

Dennis E. Welliver, President

In addition to exhibit 1, Welliver had written exhibit 2, a previous draft of exhibit 1, which contained the phrase "all previous ~~forged~~ transfer requests" instead of the language "all previous transfer requests." Exhibit 2 was not received in evidence because it was not mailed out to anyone. However, Lana Dake, an employee of Sostad & Associates insurance agency, one of NARCC's certified agencies, testified that at a meeting with Welliver which she and several agents of the Sostad agency attended, she saw a copy of exhibit 2.

In answer to a question as to whether anyone had ever told her that Turner had committed forgery in connection with his insurance business, Dake answered that "[f]orgery is a hard word but I'd say 'Yes.' " The person who had told her that was Welliver. There is no indication in the record that she ever repeated this to anyone else.

During the course of the trial it was stipulated between the parties that Turner had sent a letter to Welliver requesting a retraction of exhibit 1 and that no retraction was made. Welliver admitted that no retraction was made because, in his own testimony, he said, "It's all true." Welliver also testified that his purpose in sending out exhibit 1 was to let his customers know what was going on and to properly service these customers, and it was not done in order to get Turner out of the picture or to harm Turner.

It was on the basis of the foregoing set of circumstances that Turner filed this action for libel and slander. The case was tried on a petition filed on November 7, 1984. It was on the basis of

that pleading that the trial court made its rather explicit findings, which we believe will make it easier to follow the progress of this litigation, and we will set them out in some detail later on.

Perhaps it will flow more smoothly for us to deal with the assigned errors in reverse order.

RULINGS ON EVIDENCE

Turner complains that the court was prejudiced against him because, of the 313 objections made by defendants, 227, or 72 percent, were sustained; whereas, of the 18 objections made by Turner, only 6, or 33 percent, were sustained. We have examined each and every one of those objections, and it would serve no useful purpose to deal with each separately. Suffice it to say that although many of defendants' objections were of a technical nature, we find either no error or no prejudice. The great bulk of the objections were based on leading questions, hearsay, relevancy, opinion evidence, and the document's speaking for itself. The objected-to questions were often repeated three or four times in a slightly changed mode, which accounted for the staggering numbers.

Some of the other evidentiary questions we will treat separately. The first of those is that the court erred in refusing to receive into evidence an enlargement (24 by 36 inches) of exhibit 1, the letter written by Welliver to the various insureds. The actual letter as written was received into evidence. Generally, the reception or rejection of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of exclusion of evidence, a clear abuse of discretion must be shown. *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987). Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of its sound discretion. *Nusz v. Wells*, 214 Neb. 1, 332 N.W.2d 204 (1983). There neither was an abuse of discretion present nor was the plaintiff in any way prejudiced by the court's ruling.

The other three specific evidentiary complaints raised by Turner relate to the refusal of the trial court to declare Lana Dake a hostile witness and thereby permit the interrogation of her by means of leading questions; the refusal to permit Leo

Holthaus, an employee of FCIC, to give his opinion as to the legality and ethical nature of Turner's insurance practices; and the refusal to permit the testimony of Bruce Lavalleur, Turner's accountant, to give his opinion as to the projected losses to be suffered by Turner.

We have previously indicated that such rulings generally rest within the sound discretion of the trial court. Neb. Rev. Stat. § 27-611 (Reissue 1985) provides in part as follows: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." The problem in this case is that there is nothing in the record to sustain Turner's position taken in his brief that "[h]er [Dake's] answers were consistently evasive, her attitude was hostile and her interests were clearly aligned with those of the defendants." Brief for Appellant at 43.

The witness was identified as having been, at the time, an employee of Sostad & Associates insurance agency, as having happened into a meeting involving Sostad, Welliver, and some other employees of Sostad, and as having been shown a document which at least was similar to exhibit 2. Because of the broad discretion allowed to a trial judge in permitting or refusing a request to ask leading questions, we cannot say on the basis of the record before us that he abused that discretion. *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985).

Leo Holthaus, field operation director for the FCIC, was asked whether he had an opinion as to the legality of exhibit 5, the letter from Turner, and whether, from his investigation of the subject transaction between Turner and Welliver, he found that anyone had been guilty of unethical conduct. Objections were sustained on the bases of relevancy and foundation. No offer of proof was made by Turner as to what the answers might be. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1985). Without regard to the basis for the trial court's ruling, appellant may not predicate error on those rulings.

Finally, regarding evidentiary matters, Turner contends that

the court erred in refusing to allow his accountant, Bruce Lavalleur, to testify as to a projection of loss of income beyond 1984, which he believed Turner would suffer because of the loss of his commissions from federal crop insurance. An offer of proof was made to the effect that exhibit 18 constituted a projection of income which Turner would have had but for the loss of customers for whom he had previously written federal crop insurance. This document was based upon actual income of Turner in 1982 and projected through 1987 by inclusion of a 15-percent increase in client base, and relying not, according to the offer, on the continuation of T & E partnership, but only upon the receipt of $12,719 in commissions received by Turner in 1982.

Although accepting the offer of proof, the trial court sustained the objection to the evidence based primarily, it would seem, on the fact that the witness could not or did not disclose the basis of his assumption of a 15-percent increase in client base. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985).

Additionally, although the offer of proof recited that the opinion expressed was not based on a continuation of T & E partnership, the witness had testified earlier that he did, in making his projection, assume that T & E would continue, and immediately after the offer of proof on further examination, the witness said, "I have assumed that T & E Partnership would continue or that it would end amiably with some sort of agreement with Dick Turner and Claude Evans." No reasonable controversy appears in the record over the fact that Turner was not certified to sell federal all risk crop insurance as he had been doing, while Evans was, and that the partnership was terminated as of April 30, 1983.

It is also quite apparent from the testimony of Lavalleur that the $12,719 1982 income, upon which he proposed to base his projection, was income which Turner earned from federal crop insurance through T & E partnership. The proposed opinion, therefore, having no sound and reasonable basis in fact, was properly rejected. *Clearwater Corp. v. City of Lincoln*, 202

Neb. 796, 277 N.W.2d 236 (1979).

Turner's claimed errors regarding evidentiary matters are without merit. Accordingly, regardless of whether the proof made out a case in favor of the plaintiff for libel and slander, there was no competent evidence to support an award of special pecuniary damages. This leaves us to consider whether the case should have been submitted to the jury on the issue of general damages. To answer this question we need next to address Turner's complaint of error regarding the law applied by the trial court.

Neb. Rev. Stat. § 20-204 (Reissue 1983) provides as follows:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Neb. Rev. Stat. § 25-839 (Reissue 1985) provides as follows:

> In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him.

Neb. Rev. Stat. § 25-840 (Reissue 1985) provides:

> In the actions mentioned in section 25-839, the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.

Finally, Neb. Rev. Stat. § 25-840.01 (Reissue 1985) provides in pertinent part as follows:

> (1) In an action for damages for the publication of a libel or for invasion of privacy as provided by section

> 20-204 by any medium, the plaintiff shall recover no more than special damages, unless correction was requested, as herein provided, and was not published. . . .
>
> (2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication.

Perhaps the most sensible manner in which to address the remaining assignments of error is to set forth each allegation in the plaintiff's petition, followed by the trial court's ruling and discussion by this court.

LIBEL

The plaintiff alleges at paragraph 4 that the defendants made the following false accusations:

(1) *The plaintiff practiced forgery in connection with FCIC transfer documents.*

The trial court found that the letter, exhibit 1, does not accuse or imply that plaintiff practiced forgery.

We agree. The letter refers to "all previous transfer requests," not "all previous ~~forged~~ transfer requests" as stated in uncirculated exhibit 2.

(2) *The plaintiff executed FCIC documents without client authority.*

The findings of the court recite that exhibit 1 does not accuse or imply that plaintiff executed documents without client authority.

What the letter did state was that a transfer of a "Federal 'All Risk' Contract" required a signed request by the client, not a signature written in by Turner. This view is undisputed in the record.

(3) *The plaintiff engaged in unethical insurance practices.*

Although the trial court found that exhibit 1 did in fact accuse the plaintiff of unethical conduct, which statements were actionable per se and would subject the defendants to liability without proof of special damages, it concluded as a matter of law that the statements were true and were privileged. It then held that there was no liability on the defendants because the defendants did not act in reckless disregard of the truth or falsity of the statement, and, furthermore, the plaintiff alleged

actual malice in his petition and was therefore held to that standard of proof rather than negligence in failing to ascertain the truth of the statement. The trial court referred to Restatement (Second) of Torts § 580B (1977).

The statements made by the defendants were that the plaintiff was the subject of a USDA investigation in the past and probably would be subject to an additional investigation in the future, that he was uncertified to sell FCIC insurance, and that he failed to attend training sessions. These statements are not contradicted by the record. In addition, the plaintiff's own testimony supports the truth of his unethical conduct. He agreed that backdating of his partnership agreement with Evans was illegal; he acknowledged that he should have known that the signing of the 758 forms with the farmers' names, with his initial, was not a permitted practice; and he conceded that his contact with a Kevin Pesek was "shady."

We find that the overwhelming weight of the evidence supports a conclusion that the statements made by Welliver in exhibit 1 were true. Although for purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict. *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981); *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980).

In addition, we find that the communication carried with it a qualified privilege. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234, 252 N.W.2d 168 (1977); *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929) (citing *Wise v. Brotherhood of Locomotive F. and E.*, 252 F. 961 (8th Cir. 1918)). Where a qualified privilege exists, there can be no recovery without proof of malice. *Kloch v. Ratcliffe, supra; Bartels v. Retail Credit Co.*, 185 Neb. 304, 175

N.W.2d 292 (1970).

Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty. 53 C.J.S. *Libel and Slander* § 89 (1948). The Restatement (Second) of Torts discusses several factors that determine the existence of a conditional privilege arising from an occasion, some of which could be involved in this case.

The conditional privilege involved in this case depends on the relationship among Turner, Welliver, and the recipients of exhibit 1. It appears that Turner was a subagent of Welliver, so the farmers who bought crop insurance from Turner were actually insureds of Welliver's agency. The communications between an insurer and insured may fall within the conditional privileges set out in the Restatement (Second) of Torts § 595 (1977). The Restatement, *supra*, states that a communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct. The Restatement, *supra*, § 596, states that a communication between those sharing a common interest is conditionally privileged. Cases involving a conditional privilege between an insurer and an insured are annotated at Annot., 85 A.L.R.3d 1161 (1978).

In several cases discussed in the annotation, courts have held that communications between an insurer and insured about an agent of the insured were qualifiedly privileged. This would be a similar situation as that in the present case, assuming Welliver as the insurer, Turner as his subagent, and the farmers as the insureds.

In *Hahn v. Kotten*, 43 Ohio St. 2d 237, 331 N.E.2d 713 (1975), the plaintiff, a district manager of Woodmen Accident and Life Company, was terminated. He sued the insurance

agency manager and two district managers for slander. The trial court directed a verdict for the defendants, and this was upheld by the Ohio Supreme Court. The defendant agents were instructed to tell insureds who had been served by the plaintiff agent that the agent had been terminated for cause, and if pressed for information, they were to show the insured a copy of the agent's contract describing circumstances under which an agent could be terminated for cause. Following these instructions, the defendant agents communicated with certain insureds of the plaintiff, and these communications were the basis of the slander suit.

The court held that the plaintiff's questionable conduct, including diverting company funds to his own use, placed a duty on the defendant agents to communicate with the insureds and that such communications were qualifiedly privileged. The court stated that a qualified privilege applies where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it. Since the insureds were all doing business with the plaintiff at the time of his termination and subsequently transferred their insurance to the agent's new company, the insurer had a common interest with each insured, and the communication was reasonably calculated to protect or further that interest. In addition, the defendant agents had a legal and moral duty to speak. The court stated that the trial court properly found that the statements were qualifiedly privileged and that without some evidence in the record of the defendants' actual malice, the trial court was required to grant the defendants a directed verdict. See, also, *Trice v. Lancaster*, 270 S.W.2d 519 (Mo. App. 1954); *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S.W. 100 (1909); *Miller Ins. Agency v. Home Fire etc. Ins. Co.*, 100 Mont. 551, 51 P.2d 628 (1935); *Peterson v. Cleaver*, 105 Neb. 438, 181 N.W. 187 (1920).

Because the relationship among those involved in the present case is like the insurer-insured relationship in the cases from the annotation, a similar privilege would apply in this case.

Whether a publication was a privileged one is a question to be determined by the court as an issue of law, unless the facts are in dispute, in which case the jury will be instructed as to the proper

rules to apply. Prosser and Keeton on the Law of Torts, *Qualified Privilege* § 115 (5th ed. 1984). We find the record to reflect no reasonable controversy in this regard and that the communication carried with it a conditional privilege.

This does not dispose of this issue, however. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); § 25-840.

This has nothing to do with plaintiff's claimed error that the trial court incorrectly held plaintiff to a standard of malice, even though, because of the requested correction, § 25-840.01 seems to eliminate the "actual malice" requirement. The requirement of proof of malice to overcome a qualified privilege is quite another matter.

In *Whitcomb v. Nebraska State Education Assn.*, 184 Neb. 31, 165 N.W.2d 99 (1969), this court noted that with the 1957 addition of the last two sentences of § 25-840, truth was made a complete defense absent the proof of actual malice. This is consistent with the constitutional provision, Neb. Const. art. I, § 5, that "the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."

The "malice" as used in § 25-840 must have meant common-law actual malice, rather than the constitutional definition contained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), because that case postdated our statutory definition by some 7 years.

This court apparently has never defined common-law actual malice in a majority opinion. In *Iden v. Evans Model Laundry*, 121 Neb. 184, 236 N.W. 444 (1931), a dissenting opinion defines express malice (another word for actual malice) as hate, spite, or ill will. The common-law actual malice rule seems to focus on the defendant's attitude toward the plaintiff, while the *New York Times* actual malice rule focuses on the defendant's attitude toward the truth. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). This is consistent with the definition of the term in the dissenting opinion in *Iden*, and we adopt that definition for the purposes of this case.

The only direct evidence on the issue of good faith or absence

of malice was provided by the testimony of Welliver, who said that his purpose in sending out the letter was to let his customers know what was going on and to properly service these customers, and it was not done in order to get Turner out of the picture or to harm Turner. The fact remains that Turner did send out information to customers of his, who were also insureds of Welliver, which was not accurate and which obviously was intended to lure those customers away from Welliver's Nebraska All Risk Crop Company. Welliver's response would not be unexpected. We find no credible evidence to support a finding of malice on the part of Welliver, and the trial court was correct in its ruling in this regard.

(4) *The plaintiff engaged in illegal insurance practices.*

The trial court found that exhibit 1 does not accuse the plaintiff of engaging in illegal insurance practices, but it did characterize the plaintiff's letter (exhibit 5) as being an illegal letter. However, according to the district court's findings, that statement constituted opinion which is not actionable, as provided by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and Restatement (Second) of Torts § 566 (1977).

The Restatement, *supra* at 170, provides the following regarding expressions of opinion as defamation: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Restatement draws a distinction between two kinds of expression of opinion. The simple expression of opinion, or pure opinion, occurs when the maker of the comment states the facts on which he bases his opinion and then expresses a comment as to the plaintiff's conduct, qualifications, or character. The Restatement, *supra* at comment *b*. The pure type of expression of opinion also may occur without the expression of the alleged facts on which the maker bases his opinion, but both parties to the communication know the facts or assume their existence and the comment is clearly based on those facts. *Id.*

The second kind of expression of opinion, the mixed type, is an opinion in form or content but is apparently based on facts

about the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. The expression of the opinion gives rise to the inference that the defendant knows undisclosed facts that justify the forming of his opinion.

The Restatement, *supra* at comment *c.*, states that the common-law rule that a pure type of an expression of opinion may be the basis of a defamation action appears to have been rendered unconstitutional by *Gertz v. Robert Welch, Inc.*, *supra*. The Court in *Gertz* stated at 339-40:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

As comment *c.* recognizes, the language in *Gertz* about there being no such thing as a false idea was only dicta. In addition, *Gertz* involved a media defendant, while the present case involved a nonmedia defendant. However, comment *c.* states that the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type. Courts have interpreted *Gertz* as prohibiting defamation actions based on expressions of pure opinion, even when nonmedia defendants are involved. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (involving a labor dispute, with the president and vice president of a labor union as the plaintiffs and the employer of union members as the defendant).

In *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985), an insurance agent and a business brought a defamation action against the author of an article in a trade association newsletter. The article was later sent to two prospective customers, and it was on this action that plaintiffs sued. The article used language such as "fraud" and said that certain agents "acted with 'greed' " in order to "fleec[e]" customers. *Id.* at 778. The plaintiffs alleged that the defendant knew the statements were false and defamatory and were made for the purpose of dissuading the customers from buying life insurance from the plaintiffs and to damage their business reputation. The petition

was dismissed for failing to state a cause of action, and the Missouri Supreme Court affirmed, finding that the statements were nonactionable opinion.

In the final analysis, Welliver's characterization of Turner's letter (exhibit 5) as an "illegal" letter only describes a violation of USDA regulations, which the record bears out as true, and was not actually an accusation of criminal conduct. Additionally, even if Welliver's statements did not qualify as nonactionable pure opinion, the truth of the statements still would be a defense to any defamation claim.

(5) *Plaintiff was the subject of USDA investigation for illegal and unethical insurance practices and would be the subject of an additional investigation.*

According to the trial court, exhibit 1 did accuse and imply that the plaintiff was the subject of a USDA investigation for unethical practices and could be the subject of additional investigation and, as such, was defamatory. As in (3), above, the trial court, however, found that such statements were actionable per se and would subject the defendants to liability without proof of special damages unless the statements were true. The trial court found as a matter of law that the evidence disclosed that the statements were true and were privileged.

We believe that our discussion in (3), above, regarding truth and malice, as well as our general discussion as to special damages, adequately disposes of this issue.

(6) *The plaintiff was uncertified to sell FCIC insurance.*

The trial court, as in (3) and (5), above, held that this was an actionable statement, but furnished no basis for recovery by the plaintiff because of the factors of truth and the absence of malice. This too has been disposed of by our discussion above.

(7) *The plaintiff failed to attend certification training sessions in connection with FCIC insurance.*

The truth of this statement is adequately supported in the record beyond any reasonable dispute, and there is no showing of malice.

SLANDER

The plaintiff alleges at paragraph 8 of his petition that the defendants made the following false accusations:

(1) *The plaintiff was no longer handling all risk crop*

insurance, and the only way clients would retain coverage was to sign a cancellation and request for transfer of their business to the defendants' companies.

The trial court found the defendant's allegation to be true. There is no evidence in the record to the contrary which affirmatively shows that Turner was switching to a program which was the same as federal all risk insurance.

(2) *The plaintiff was uncertified to sell crop insurance, including all risk crop insurance.*

Again, the trial court found that there was absolutely no evidence to support this allegation, except as to all risk coverage and that was true. Nowhere does the record suggest that Welliver stated that Turner was not certified to sell any kind of crop insurance.

(3) *The plaintiff is unethical and refused to obtain the necessary certification to sell crop insurance, including all risk crop insurance.*

As previously stated, the allegation regarding certification was true. Furthermore, the plaintiff himself admitted that his backdating of the partnership agreement was illegal, that he should have known that to sign the individual farmers' names to 758 forms was wrong and not allowed, and that his contact with Pesek was shady.

(4) *The plaintiff had previously been investigated by the USDA for unethical practices and would be investigated again.*

The trial court found that there was nothing in the record to support any such oral statements in that regard. Our opinion has previously discussed and disposed of similar allegations under the heading of libel.

(5) *The plaintiff practiced forgery in executing documents on behalf of insurance clients.*

Turner alleged that Welliver slandered him by stating that Turner practiced forgery in executing documents on behalf of insurance clients. Welliver might have used the word "forgery" when talking to Lana Dake, and did use the word when talking to his secretary. The court found that, even assuming the word "forgery" had been used, there was no evidence of harm to plaintiff's reputation, and there was no competent evidence to prove that the plaintiff suffered any special damages, in part

because there was no proof that the statements were repeated to anyone else.

In addition, applying the principles previously stated in regard to libel, we believe that a conditional privilege attached to these statements. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the declarer to give the information. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985). A communication between those sharing a common interest is conditionally privileged. Restatement (Second) of Torts § 596 (1977).

Because the record discloses no proof of actual malice to overcome the conditional privilege, there can be no liability on Welliver.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

EILEEN M. TIEDE, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES F. TIEDE, DECEASED, APPELLANT, V. LOUP POWER DISTRICT, A CORPORATION, AND GERALDINE KENNEDY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ARNOLD KENNEDY, DECEASED, APPELLEES.

411 N.W.2d 312

Filed August 21, 1987. No. 85-735.

1. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. _____. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every

inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

3. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
4. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
5. _____: _____. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
6. **Negligence: Words and Phrases.** A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
7. **Invitor-Invitee: Negligence.** While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
8. **Negligence.** The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril.
9. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
10. _____: _____: _____. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
11. _____: _____: _____. Power companies are not insurers and are not liable for damages in the absence of negligence.
12. _____: _____: _____. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
13. **Negligence: Words and Phrases.** One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
14. _____: _____. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the

part of the defendant, is a proximate cause of injury.

15. _____: _____. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.

16. **Public Utilities: Electricity: Negligence.** One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed.

Thomas J. Young of Young, LaPuzza & Stoehr, for appellant.

Jewell, Gatz & Collins, for appellee Kennedy.

Noyes W. Rogers of Leininger, Grant, Rogers & Maul, for appellee Loup Power Dist.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Eileen M. Tiede, personal representative of the estate of her late husband, Charles F. Tiede (hereinafter Tiede), alleges that the negligence of defendant-appellee Loup Power District and that of defendant-appellee Geraldine Kennedy, the personal representative of the estate of her late husband, Arnold Kennedy, caused the 37-year-old Tiede's death when he was electrocuted while helping harvest crops on the Kennedy farm. At the close of plaintiff's evidence, the trial court sustained the defendants' motions to dismiss, and plaintiff appeals. Her six assignments of error fuse into claims that the trial court erred in concluding that (1) neither Loup Power District nor the Kennedy estate was negligent, (2) Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law, and (3) he assumed the risk of injury and was thus precluded from recovery as a matter of law. We affirm.

On November 22, 1981, Tiede, a neighbor of the Kennedys,

was working on the Kennedy farm under an "exchange of work agreement" whereunder Tiede and the Kennedys pooled equipment and helped each other harvest their respective crops.

The owner of the farm, Arnold Kennedy, had died prior to the events in question, and management of the farm passed to his son, John Kennedy, Sr. However, the son had been injured earlier that fall and as a result could not supervise the harvest. Thus, the deceased Kennedy's 16-year-old grandson, John Kennedy, Jr. (hereinafter John Kennedy), was left to take care of the harvest. However, Tiede made many of the decisions because of his superior age and experience.

The point had been reached in the day's work when the westernmost of four grain bins on the site was to be filled with corn through the use of an auger which was 62 feet long and 32.5 feet high when fully raised, but only 15 feet high when completely lowered. The bin reached a height of 25 feet 8 inches and was 22.2 feet in diameter. A 14,400-volt three-wire electrical line ran diagonally from a pole located at a distance of 66.4 feet northwest of the westernmost edge of the bin to a pole 45.8 feet south of the southernmost edge of the bin. Tiede not only knew of the existence of the line, which had been in place since at least 1966, but had warned others about the dangers it posed.

Although Tiede knew that in previous years the subject bin had been loaded from the southeast, he wanted to load it from the west. John Kennedy had told Tiede that one reason the bin had been loaded from the southeast was because of the high-voltage electrical line. Nonetheless, Tiede said that there was room to miss the wires. John Kennedy said it was fine with him if Tiede wanted to try it. Tiede held the safety catch on the auger while it was being raised. James P. Nolan, another neighbor, and William Streeter, Tiede's hired man, lifted the lower end of the auger and began moving it, while raised to its maximum height, in position to load the bin from the west. Nolan and Streeter were pushing the auger, while Tiede was standing next to it, about 15 feet east of them. The auger either came into contact with one of the high-voltage wires or came close enough to the line to create an arc, causing electrical current to flow through the auger into the surrounding soil, thereby killing

Tiede, Nolan, and Streeter. Tiede's body was found directly under one of the support legs of the auger. John Kennedy's cousin, James Kennedy, was also in the area and was shocked unconscious, but survived because he was far enough away from the auger. The contact, or arcing, occurred at a point 24.5 feet southeast of the westernmost pole, where the line, as measured on May 31, 1985, when the temperature was 60 °F, was at an elevation of 20 feet 11 inches.

While the height of the line exceeded the standards set by the National Electric Safety Code, there was evidence from which a jury could conclude that it should have been built over and along a fence line.

It is good to begin our analysis of the applicable law by recalling that in sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Herman v. Bonanza Bldgs., Inc., supra; Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985).

In ruling on the Kennedy estate's motion, the trial court concluded there was "not sufficient evidence"; that is to say, that the plaintiff failed to establish the estate had been negligent.

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). It is axiomatic that the burden of proving negligence is on the party alleging it and that merely establishing that an accident happened does not prove negligence. *Himes v. Carter*, 219 Neb. 734, 365 N.W.2d 840 (1985); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980).

The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk. See *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). We thus consider first whether the plaintiff met her burden of proof as to the Kennedy estate.

A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Holden v. Urban, supra.* The duty owed by the owner of premises to his invitees is well established in Nebraska. While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury. *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984). The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril. *Hirschman v. Maddox*, 223 Neb. 302, 389 N.W.2d 297 (1986).

The evidence establishes that Tiede knew about the presence of the lines, was told it was because of the lines that the bin had in the past been loaded from the southeast side, and that, indeed, he had warned others about the lines. Thus, Tiede knew of and fully appreciated the peril. This being so, the landowner was under no duty to warn Tiede of the danger presented by the lines, or had extinguished that duty through adequate prior warnings. *Hirschman v. Maddox, supra.* There being no legal duty, there is no actionable negligence on the part of the landowner. *Holden v. Urban, supra.* The trial court therefore correctly dismissed the claim against the Kennedy estate.

We thus move on to consider the claim against Loup Power District. A power company engaged in the transmission of

electricity is required to exercise reasonable care in the construction and maintenance of its lines. *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961). The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property. *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Roos v. Consumers Public Power Dist., supra.* However, power companies are not insurers and are not liable for damages in the absence of negligence. *Suarez v. Omaha P.P. Dist., supra; Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970); *Roos v. Consumers Public Power Dist., supra; New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N.W. 89 (1905).

The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries. *Gillotte v. Omaha Public Power Dist., supra.* Where the circumstances are such that the probability of danger to persons having a right to be near an electrical line is reasonably foreseeable, power companies have often been held liable for injury or death resulting from contact between the powerline and a movable machine. *Gillotte v. Omaha Public Power Dist., supra*; Annot., 69 A.L.R.2d 93 (1960). Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence. *Suarez v. Omaha P.P. Dist., supra; Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Gillotte v. Omaha Public Power Dist., supra; Roos v. Consumers Public Power Dist., supra.*

The evidence that the line should have been built over and

along a fence line requires us to assume, as we do, that the plaintiff proved Loup Power District was negligent. We must thus determine whether Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury. *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987); *Lynn v. Metropolitan Utilities Dist., supra.*

To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Disney v. Butler County Rural P.P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968). One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity. *Rodgers v. Chimney Rock P.P. Dist., supra; Disney v. Butler County Rural P.P. Dist., supra.*

In several cases involving contact with high-voltage electrical lines, we have found that the plaintiff's knowledge of the existence of a high-voltage powerline was sufficient to constitute contributory negligence sufficient to bar recovery as a matter of law.

In *Suarez v. Omaha P.P. Dist., supra*, we held that a 12-year-old boy who climbed to the top of a tree where he could almost touch high-voltage electrical wires was contributorily negligent

as a matter of law and thus barred from recovery.

In *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984), the plaintiff's decedent was cleaning a well pit with a 28- to 30-foot metal pipe connected to an air compressor. A high-voltage line ran directly over the well. The plaintiff's decedent knew of the existence of the line and of the dangerous nature of electricity, and had been careful to avoid coming into contact with the line when moving equipment and haystacks. However, the metal pipe came into contact with the powerline, and the plaintiff's decedent was electrocuted. We held that the evidence was sufficient for the trial court to find that the plaintiff's decedent was guilty of contributory negligence which was more than slight and that he had assumed the risk of injury from contact between the metal pipe and the electrical wire.

In *Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974), we reversed the district court's decision in favor of the plaintiff and dismissed the case because the plaintiff was contributorily negligent as a matter of law. Lorence was repairing the lights on an outdoor advertising sign and brought a 20-foot aluminum ladder into contact with a powerline. Lorence had warned a newly hired electrician about the dangers of overhead powerlines. We held that the only inference that could reasonably be drawn from the evidence was that Lorence was contributorily negligent as a matter of law.

The case most factually analogous to the evidence before us is *Disney v. Butler County Rural P.P. Dist., supra*. The plaintiff in *Disney* was pulling 70-foot irrigation sprinkler arms under a two-wire electric power transmission line. Although he knew the equipment was elevated and thus had marginal clearance under the wires, he did not lower the boom to irrigating position before going under the wires. Pulling into the yard with the irrigation trailer system arms elevated and behind him, Disney stopped his tractor without first looking to see how close the arms were to the line. He apparently touched some part of the tractor while jumping off and was shocked unconscious. The evidence showed Disney knew about the lines, that they carried electricity, that it was dangerous to get anything in contact with or close to the lines, and that " 'he was going to get in

trouble' " if he got close to the lines. *Id.* at 422, 160 N.W.2d at 758. We held that the facts were conclusive of contributory negligence on the part of the plaintiff, who was clearly capable of understanding and discretion, at the time of the accident had knowledge of and was conscious of the danger involved, knew of the dangerous condition, and failed to exercise ordinary care to avoid an open and obvious danger.

The facts of this case compel a similar finding of contributory negligence sufficient to bar plaintiff's recovery as a matter of law. Tiede was a participant in the activities designed to move the auger while in a raised position higher than the electrical line about which he had been warned and about which he had warned others. The high-voltage line presented an open and obvious hazard which Tiede could have avoided by lowering the auger before participating in its move. Accordingly, the trial court was correct in determining that Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

The foregoing conclusion makes it unnecessary for us to consider whether Tiede assumed the risk of injury as well.

AFFIRMED.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, ET AL., APPELLEES, V. GERALD M. KOCH, INDIVIDUALLY AND AS TRUSTEE FOR STEPHEN GERALD KOCH AND KENNETH MARTIN KOCH, MINORS, APPELLANT.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, APPELLEES, V. GERALD M. KOCH AND CAROL KOCH, HUSBAND AND WIFE, APPELLANTS.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, ET AL., APPELLEES, V. GERALD M. KOCH AND CAROL KOCH, HUSBAND AND WIFE, ET AL., APPELLANTS, COUNTY OF DIXON, NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

411 N.W.2d 319

Filed August 21, 1987. Nos. 85-769, 85-770, 85-771.

1. **Attorney and Client.** It is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved.
2. **Parties.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Robert G. Scoville of Ryan & Scoville Law Office, for appellants.

William Horneber of Horneber Law Offices, for appellees Martin C. and Marie F. Koch and George M. and Dorothy M. Koch.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellees Martin C. and Marie F. Koch are the parents of the appellant Gerald M. Koch and the grandparents of Stephen Gerald Koch and Kenneth Martin Koch, the minor children of Gerald M. and Carol Koch.

Originally, Martin and Marie Koch were the owners of two

parcels of real estate. The first parcel (hereafter Section 29) is described as:

> The Southeast Quarter (SE1/4) and the North Half of the Northeast Quarter (N1/2 NE1/4) and the East Half of the Northwest Quarter except a tract of approximately 3 1/2 acres, beginning at the Northwest corner of said East Half of the Northwest Quarter (E1/2 NW1/4), thence South 40 rods, thence East 14 rods, thence North 40 rods, thence West 14 rods to point of beginning, all in Section Twenty-nine (29), Township Thirty-one (31), North, Range Four (4), East of the 6th P.M., in Dixon County, Nebraska.
>
> The South Half of the Northeast Quarter (S1/2 NE1/4) of Section Twenty-nine (29), Township Thirty-one (31), North, Range Four (4), East of the 6th P. M., containing 80 acres, more or less.

The second tract of land (hereafter Section 21) is described as:

> The East Half of the Northeast Quarter (E1/2 of the NE1/4) of Section Twenty-one (21), Township Thirty-one (31) North, Range Four (4) East of the 6th P.M., Dixon County, Nebraska.

In June of 1975, Martin and Marie Koch drafted a real estate contract in which they agreed to convey all of the property in Section 29 to Gerald and Carol Koch for $79,200. The contract recited that $12,000 was received by Martin and Marie Koch at that time. It also provided that Gerald and Carol Koch would assume a mortgage of $7,500 and that, for 20 years, they would make annual payments to Martin and Marie Koch for the balance of $59,700 plus interest.

In May of 1979, Martin and Marie Koch drafted an agreement for warranty deed in which they agreed to convey all of the above-described property in Section 21 to Gerald Koch, as trustee for his minor children, Stephen and Kenneth Koch. The agreement recited that the consideration for the conveyance was $40,000. The agreement further recited that $6,000 was "received" by Martin and Marie Koch "as a gift from sellers to purchaser" and that the purchaser would, for 20 years thereafter, make annual payments to Martin and Marie

Koch for the balance of $34,000 plus interest.

For reasons which are not particularly clear, in August of 1983, Martin and Marie Koch executed a warranty deed covering a portion of Section 29 to Gerald Koch "in consideration of Gift (Love and Affection)." Specifically, they transferred the "South half (S1/2) of the Southeast Quarter (SE1/4) of Section Twenty-nine (29), Township Thirty-one (31) North, Range Four (4), East of the 6th P.M., Dixon County, Nebraska." This was property that had previously been conveyed in June of 1975.

Thereafter, a dispute developed between Martin and Marie Koch and their son and daughter-in-law, Gerald and Carol Koch, and as a result of that, three lawsuits were filed in the district court for Dixon County, Nebraska. It appears from the record that the interests of appellees George M. and Dorothy M. Koch are as lessees of certain of the property involved in this litigation.

Subsequently, the parties entered into a stipulation whereby it was agreed that the district court for Dixon County should enter a decree providing that the property in Section 29 was to be conveyed by warranty deed to Gerald and Carol Koch as joint tenants. At the same time, the decree was to stipulate that the property in Section 21 was to be conveyed back to Martin and Marie Koch and that Gerald Koch, individually and as trustee for Stephen and Kenneth Koch, was to execute a quitclaim deed conveying all of their interests to the property in Section 21 back to Martin and Marie Koch. Also, the stipulation provided that certain personal property consisting principally of machinery and grain was to be divided between Martin and Marie Koch and Gerald and Carol Koch, with Gerald and Carol Koch paying $16,000 for the property granted to them to Martin and Marie Koch. Farm debts were divided between the parties. When all was said and done, Gerald and Carol Koch were once again the owners of the property in Section 29, as joint tenants, and Martin and Marie Koch were the owners of the property in Section 21, as joint tenants. The minor children were left without any interest in any property.

Gerald and Carol Koch, individually, and Gerald Koch, as

trustee for Stephen and Kenneth Koch, then filed a motion to vacate the decree which the district court had entered pursuant to the stipulation of the parties, alleging that they had not agreed to the stipulation or authorized their attorneys to enter into the stipulation. Gerald Koch, as trustee for Stephen and Kenneth Koch, also filed a motion to vacate the decree and to appoint a guardian ad litem for the minors. In the motion he alleged that the minor children were necessary parties to the lawsuit, had not been joined, and had not had a guardian ad litem appointed for them. The district court overruled these motions, and appeal was then taken to this court.

A number of assignments are raised. We may, however, dispose of these matters by simply addressing a single question with regard to each section of land. With regard to Section 29, the question is whether the district court erred in failing to sustain the appellants' motions to vacate the decree entered pursuant to the stipulation. With regard to Section 21, the question is whether the district court erred in failing to sustain the motions to vacate the decree because the minor children had not been made parties to the action and had not had a guardian ad litem appointed for them. We believe that the first question must be answered in the negative and the second in the affirmative, thereby requiring us to in part affirm and in part reverse and remand.

We turn first, then, to the issue involving Section 29. From the evidence it is clear that the minor children had no interest in this property. The only question, therefore, is whether the stipulation was entered into with the knowledge and consent of the appellants Gerald and Carol Koch. In answering that question we note that in *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 471, 348 N.W.2d 903, 907 (1984), we said: "[I]t is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved." For that reason, therefore, the burden was upon the appellants to establish that their attorneys were without authority when they acted. We do not believe that the appellants have met their burden.

To begin with, the record discloses that the appellants Gerald

and Carol Koch were present in the courtroom when their attorneys submitted the stipulation to the district court. Certainly, it is clear that they were aware the stipulation was being offered. Furthermore, the record discloses that at the hearing on the motions to vacate the appellant Gerald Koch was questioned regarding the stipulation and answered as follows:

> Q. Mr. Koch, during the negotiations preceding the entry of this stipulation on April 30, 1985, did you discuss with your attorneys, Mr. Fitch and Mr. Behm the real estate terms of that Stipulation?
>
> A. Yes, we did.
>
> . . . .
>
> Q. Would you tell the Court the substance of what you asked and when you asked it?
>
> A. Well, it was one of them long nights about 12 o'clock at night. He said we had to give away the kids' land. We kept asking the question, "Do we have the right?" That is no problem. Sign some papers and that will be all over with.

The appellants' former attorney, Donald Fitch, also testified at the hearing:

> Q. Prior to the entry of the Court's Order on April 30, 1985, approving the parties' stipulation in the three cases in question—which I believe the Court has been asked to take judicial notice of—as counsel, did you discuss the terms with your clients?
>
> A. Yes.
>
> Q. With all your clients?
>
> A. Yes.
>
> Q. With Gerald individually and as a trustee for the minor children?
>
> A. Gerald and Carol Koch were present at all the discussions together.
>
> . . . .
>
> Q. Did you discuss the conveyance of real estate—strike that. Was the conveyance of the real estate and terms of this stipulation entered on 4-30-85 discussed with your clients?
>
> A. The trust property?

Q. No, the conveyance. The real estate terms in general of that stipulation, were they discussed with your clients?

A. Yes.

. . . .

Q. Was the conveyance of the real estate agreed to by all your clients?

A. Yes.

. . . .

Q. Did these real estate terms of the stipulation . . . was this discussed with the Defendant-Trustee?

A. Yes, on several occasions.

. . . .

Q. Mr. Fitch, did you discuss with the Defendant-Trustee the probability of the Court's setting aside this agreement for warranty deed on this trust property?

A. Yes, we discussed several options in connection with the trust property.

Q. Did you explain the effect of such an order? That is an order setting aside the order for warranty deed?

A. Yes.

. . . .

Q. At the time of entry into the stipulation on 4-30-85 was the Defendant-Trustee in agreement with the disposition of the real estate; including the trust property on April 30, 1985?

A. In agreement, subject to some concern about how it could be done or whether it could be done.

. . . .

Q. . . . Once again getting back to the stipulation, was the ownership distribution and/or delivery of personal property, including farm machinery, set out in the stipulation?

A. Yes.

Q. And it was agreed by your clients?

A. I thought it was.

. . . .

Q. . . . Were items 1 through 15 on pages 2 and 3 specifically discussed with your clients?

A. If I'm not mistaken, all of these 15 items were

discussed . . . .

Q. It was understood and agreed to by your clients?

A. As far as I knew they were.

. . . .

Q. And [was the purchase price of $16,000] agreed to by your clients?

A. I was under the impression they were.

Q. Were you authorized to enter into the stipulation on their behalf?

A. Yes.

. . . .

Q. Were you authorized to enter into this stipulation with [the release of the bill of sale] in there?

A. I believed that I was, yes.

. . . .

Q. The division of the existing hay inventory, was this discussed with your clients?

A. Yes.

Q. Was that agreed to?

A. Yes.

Q. Were you authorized to so stipulate?

A. Yes, I thought I was.

. . . .

Q. And were you authorized to settle all three cases for all Defendants or Respondents in this matter?

A. Yes.

Q. Following the discussion with your clients of these specific terms of the stipulation, did your clients agree to accept those terms following your discussion?

. . . .

A. Yes.

Q. Were your clients advised of the specific terms of the stipulation prior to it being presented to the Court as Exhibit 1 and added into evidence?

A. Yes.

Thus, it seems clear beyond question that the weight of the evidence supports the contention that the appellants had authorized and consented that their attorneys enter into the stipulation. At least, absent any evidence to the contrary, it

cannot be said that the appellants have met their burden in this regard. For that reason, it appears to us that the stipulation and subsequent decree as they affect Section 29 must be affirmed.

The situation with regard to Section 21 is an entirely different matter. In *Johnson v. Mays*, 216 Neb. 890, 897, 346 N.W.2d 401, 405-06 (1984), we said:

> " 'Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . .' "

See, also, *Klitzing v. Didier*, 215 Neb. 122, 337 N.W.2d 418 (1983); *James J. Parks Co. v. Lakin*, 206 Neb. 184, 292 N.W.2d 21 (1980); *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977).

Further, in *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959), this court found that the minor beneficiaries to a trust were indispensable parties to an action involving the trust. In so holding, we said at 869-70, 95 N.W.2d at 194:

> The beneficiaries of the arrangement made by Workman and Mrs. Workman as pleaded in the third amended and supplemental petition are their children, three of whom are minors. It follows they are necessary parties to the litigation as a condition of a full and final determination of the controversy alleged in this case. This is especially true if, as appellees contend, Mrs. Workman does not have capacity to be a proper plaintiff in the case, which it is not now necessary to determine. The Code of Civil Procedure declares if a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought into the litigation. § 25-323, R. R. S. 1943. Smith v. Shaffer, 29 Neb. 656, 45 N.W. 936, declares: "When it appears that all the parties necessary to a proper and complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in." See,

also, Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N.W.2d 533; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W.2d 630.

Furthermore, Neb. Rev. Stat. § 25-323 (Reissue 1985) provides:

> The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

One may argue that the minor children were present by reason of the fact that Gerald Koch sued both individually and as trustee for the minor children. In fact, the appellees argue that under the provisions of Neb. Rev. Stat. § 30-2222 (Reissue 1985) of the Nebraska Probate Code, the presence of Gerald Koch as trustee for the minor children was sufficient. Without attempting to analyze the full ramifications of that section, we believe that the language of the section, as relevant to this action, discloses on its face that the children were without representation. Section 30-2222(2)(ii) provides as follows: "To the extent there is *no conflict of interest* between them or among persons represented . . . orders binding a trustee bind beneficiaries of the trust . . . . If there is *no conflict of interest* and no conservator or guardian has been appointed, a parent may represent his minor child." (Emphasis supplied.)

The simple answer to this issue is that, at least on its face, there appears to be a clear conflict of interest. The property involved in Section 21 was owned by the minor children. When the settlement was finally effected, the trustee parent was an owner of Section 29, the grantor grandparents were the owners of Section 21, and the minor children were left without any interest in any property. It is difficult to imagine how that situation does not, at least on its face, establish a conflict of interest. For that reason, we believe that the minor children were necessary parties to the disposition of their interests in Section 21, though their father's interest has been disposed of. We therefore believe that the decree, insofar as it terminated the interests of the minor children in Section 21, was erroneous,

and that portion of the cause must be reversed and remanded with directions to make the minor children parties to the action, appoint a disinterested guardian ad litem for them, and litigate the issue of the interests of the minor children in Section 21. The decision of the district court is affirmed insofar as it affects Section 29 and the interest of Gerald Koch in Section 21, and reversed and remanded for new trial insofar as the interests of the two minor children in Section 21 are concerned.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

PAWNEE COUNTY BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. KERMIT DROGE, APPELLEE.

411 N.W.2d 324

Filed August 28, 1987. No. 85-634.

1. **Pleadings: Proof.** A defendant must prove all elements of an affirmative defense.
2. **Undue Influence: Proof.** In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
3. **Fraud: Proof.** To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and Michael J. Donahue and Victor Faesser of Witte, Donahue & Faesser, P.C., for appellant.

L. Joe Stehlik, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiff-appellant, Pawnee County Bank, a Nebraska banking corporation (hereafter Bank), brought this action in the district court for Pawnee County, Nebraska, against defendant-appellee, Kermit Droge, on a guaranty signed by Droge. The defendant affirmatively alleged that he signed the guaranty as a result of misrepresentation and undue influence by the Bank through the action of its officer and employee. A general jury verdict was returned in the defendant's favor. We reverse.

On October 12, 1984, the Bank filed a petition alleging that "Gary E. Droge, the son of the Defendant . . . for a valuable consideration executed in writing and delivered to Plaintiff a promissory note . . . for the total sum of $91,757.27, due, with interest, at maturity on March 8, 1984" and that "there is now due and owing upon said note the unpaid principal sum of $67,926.89 . . . ." The petition alleged, further: "ON May 12, 1983, the Defendant . . . for valuable consideration . . . executed in writing and delivered to Plaintiff a Guaranty guaranteeing to Plaintiff prompt payment of the foregoing promissory note," and "Defendant has failed to pay the same." The Bank's petition prayed for judgment against the defendant in the amount of $75,681.43, with interest and costs.

On February 11, 1985, defendant filed an amended answer and amended cross-petition. The trial court dismissed the amended cross-petition on the Bank's demurrer, and the case went to trial on the petition and defendant's amended answer, which generally denied the Bank's allegations and affirmatively alleged:

> [P]laintiff, through its officer and employee, did coerce the defendant into signing the purported Guaranty;
>
> . . . did exercise undue influence upon the defendant in order to force him to sign said purported Guaranty;
>
> . . . induced defendant to execute the purported Guaranty by misrepresenting:
>
> a. the financial condition of defendant's son, Gary E. Droge,

b. the purpose of the purported Guaranty,

c. the potential liability of defendant by signing said purported Guaranty.

Trial was held before a jury on May 20 and 21, 1985. At the conclusion of all the testimony the Bank moved for a directed verdict, alleging that the Bank proved the material elements of its cause of action and that defendant "failed to produce evidence sufficient to sustain his affirmative defenses of misrepresentation and undue influence." The court sustained the Bank's motion for directed verdict regarding "their burden of proof on the guaranty" and instructed the jury that defendant had executed the guaranty and was indebted to the Bank in the sum of $83,221.30, unless defendant proved his affirmative defenses of undue influence or misrepresentation. The issues of misrepresentation and undue influence were submitted to the jury.

On May 21, 1985, the jury returned a general verdict in favor of the defendant. The Bank filed a motion for judgment notwithstanding the verdict and a motion for new trial, both of which were denied on July 8, 1985.

The Bank timely appeals and assigns 11 errors, which may, for the purposes of this appeal, be consolidated into the following: (1) The court erred by submitting the issue of undue influence to the jury when there was a lack of sufficient evidence on this issue; (2) the court erred in submitting the issue of misrepresentation to the jury when there was a lack of sufficient evidence on this issue; and (3) the court erred in overruling appellant's motion for judgment notwithstanding the verdict.

In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor, giving to the successful party the benefit of inferences reasonably deducible from the evidence. *Bell v. Williams Care Center, ante* p. 1, 409 N.W.2d 294 (1987).

The facts pertinent to the issues of undue influence and misrepresentation, stated in the light most favorable to the defendant, are as follows.

Gary Droge (hereafter Gary), the son of the defendant, had a

farming operation, which he financed through the Bank from 1976 to 1983. During that time Gary dealt primarily with Michael Platt, a loan officer employed by the Bank. Gary testified that early in May 1983, Platt advised him that the Bank would no longer extend credit and that Gary "had to get some help." Platt testified that he discussed Gary's 1983 financial statement with Gary. That statement showed total assets of $120,520, total liabilities of $120,164, and a present net worth of $356. Platt further testified that all of Gary's collateral had been pledged to the Bank or other lenders, and that he told Gary "we were going to have to have some additional collateral to shore up our line" and that the alternatives were "either to have someone to co-sign his [Gary's] notes with him or guarantee his line." Gary testified that he told his father, the defendant, that he was "in a little trouble up there at the bank, and that they mentioned maybe he could come up and talk to him, they wanted to talk to dad."

The defendant testified that on the day Gary asked him if he would go to the Bank, Gary "didn't tell me nothing about anything. I didn't know what the trouble was . . . . I never asked him what it was." Gary apparently arranged for a meeting for the defendant at the Bank on May 12, 1983.

The defendant, age 64 at the time of trial, testified that he was a partially retired farmer, had farmed since he was 16, and has an eighth-grade education. He and his wife owned a 320-acre farm in Pawnee County. Defendant was not a customer of the Bank other than to purchase vehicle insurance, and had never borrowed money from the Bank.

The defendant testified that on May 12, 1983, he went from his home in DuBois, Nebraska, to Pawnee City, Nebraska, to visit the Bank. Defendant testified further that he was an alcoholic, that he drank every day, that he drank on the way from DuBois to Pawnee City on May 12, 1983, and that he stopped in Pawnee City to buy liquor and drank again before he went to the Bank.

The defendant's wife, Margery Droge, testified that the defendant had been an alcoholic for a number of years and that she had no personal knowledge of how much the defendant had been drinking on the morning of May 12, 1983, but that she

knew "he wasn't in his right state of mind."

Defendant arrived at the Bank around noon and met with Platt alone in his office. Defendant testified that he had never met Platt before. The meeting between Platt and the defendant took 20 to 30 minutes.

The defendant testified that "I walked in and sit down, and I guess mentioned something about, 'You've got something around here that Gary wanted for me to see.' . . ." Defendant further testified that Platt told him "he [Platt] believed he [Gary] could be — come out of this all right . . . . He said he figured out his deal, whatever he called it, and he could see that he could make it all right . . . . No reason why he couldn't." Platt then showed the defendant a computer printout of the cash-flow of Gary's farming operation. This printout was titled "Monthly Cash Budget—Agriculture," and had been prepared by the Bank between March and May of 1983 from information provided by Gary. The defendant testified that he did not ask any questions about the cash-flow statement and that it "was chicken tracks as far as I was concerned. I didn't know what that thing was. . . . I didn't know what he was talking about." It was Platt's uncontroverted testimony that he believed he indicated to the defendant what Gary's debt was at that time, "because it's the very first figure on the sheet." The cash-flow statement showed a "short term bank debt [expressed in $000]" of "93.6" for the month of January 1983, "101.4" for May 1983, and "45.7" for December 1983. Gary testified that at the time he talked to his father in early May of 1983 about visiting the Bank, he owed the Bank over $90,000.

Defendant testified that Platt also told him "Gary was supposed to get a job. . . . [H]e was getting a job. It was 'prise to me; I didn't know how you get a job and farm both, but that's what he said, he was getting one." The defendant stated that the conversation in the meeting up to this point had taken approximately 5 minutes.

After this discussion, Platt spent 10 to 15 minutes taking a financial statement from the defendant, based on information given at that time by the defendant. Defendant signed the financial statement. The defendant then testified that Platt "went and got . . . [t]hat guaranty thing, and printed something

on it, and put it in front of me to sign." The defendant further testified that he signed the guaranty

> after I told him I said I never seen one of these things, don't know what it means. He never said anything and I kind of glanced through the thing. I did see that 125,000, I didn't know what that meant, I never seen anything else. I didn't even try to look at it . . . I don't know why I signed it
> . . . .

Platt testified that the guaranty form was a standard guaranty form used at the Bank. The guaranty signed by defendant had the word "GUARANTY" in bold letters at the top of the form and stated in pertinent part as follows:

> I hereby request Pawnee County Bank hereinafter called the "Bank" to give and continue to give credit to Gary Droge and in consideration of all and any such credit given, I hereby unconditionally guarantee prompt payment to the Bank when due, of any and all notes at any time made by said debtor to said Bank and any renewal or renewals thereof, together with any other indebtedness (now existing or hereafter incurred) of said debtor to said Bank arising from borrowings, overdrafts, notes discounted or otherwise. The Bank shall not be required to first proceed against the debtor on any past due obligation, this Guaranty being absolute in respect to prompt payment. Any and all renewals, extensions, modifications, or alterations of any indebtedness or obligation of the Guaranteed to the Bank are expressly made upon the faith and credit of this Guaranty, and are the consideration for the extension of this Guaranty.
>
> My liability herein shall not exceed One Hundred Twenty Five Thousand and no/100 . . . .

Defendant testified that he did not ask any questions about the guaranty form, and did not ask any questions all day, because he "was in a kind of a stupor, you'd call it . . . ."

Defendant further testified that Platt did not tell defendant the effect of the guaranty form and did not show the defendant Gary's financial statement before defendant signed the guaranty. Platt testified that Gary's loan file was on his desk during the meeting with the defendant, and contained both

Gary's cash-flow statement and his financial statement for 1983 which showed Gary's present net worth of $356.

On cross-examination the defendant testified that he saw the figure "125,000" on the guaranty form, but that he "never read anything on the thing." The following cross-examination ensued:

> Q Besides you and Mike Platt, there was no one else?
>
> A No.
>
> Q Did you want to leave at any time before you were finished with everything?
>
> A I don't know —
>
> Q Did you indicate the desire to leave to anybody?
>
> A I guess not.
>
> Q Okay. Was there anything that prevented you from just saying, "Goodbye, I'll think about it."
>
> A No, I guess I was too dopey to know what was going on on that part. I just sat there.
>
> Q You were free to walk out —
>
> A I suppose I was free there.
>
> Q You were free to walk out of the bank anytime?
>
> A I suppose I was.
>
> Q Nobody was restraining you, holding you?
>
> A No, they wasn't holding me.
>
> Q Physically?
>
> A No.
>
> . . . .
>
> Q Okay. Did Mike Platt make any physical threats to you —
>
> A No.
>
> Q — on May 12?
>
> A No, he didn't make no physical threats.
>
> Q Did he make any threats of an economic nature to you?
>
> A No. He was very pleasant.

The defendant testified that he did not request to take the papers home or to have an attorney look at them before signing them.

Two weeks later, Gary went to the Bank to get a copy of the guaranty for defendant. Defendant testified that up to then he

did not know what he had signed and that "I seen what it meant then after I sat down and worked it over." The defendant stated that he did not go back to the Bank after he discovered what he had signed, and did not do anything about it. After the guaranty was signed, the Bank continued to renew Gary's bank notes. On November 23, 1983, the defendant was notified by letter that the Bank was liquidating Gary's assets, that they would apply the proceeds to the debt at the Bank, and that they would look to defendant to cover any shortages.

We first consider whether there was sufficient evidence of undue influence by the Bank to submit the question to the jury. Initially, it is clear that a defendant must prove all elements of an affirmative defense. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence. *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984); *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (180).

Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. *McDonald v. McDonald, supra.* The jury's findings concerning undue influence are determinations of fact. This court's standard of review is whether such findings are supported by sufficient evidence, and the findings are not to be disturbed unless clearly wrong. *In re Estate of Massie, supra.*

Our review of the record shows that the defendant failed to establish in any way the elements required to show undue influence. We note that we are not presented, in this case, with ordinary concerns where undue influence is involved; that is, there are no such questions as the influence exerted by an adult child over an aging parent or that exerted by someone over an incompetent. In this case, defendant was not subject to any undue influence. Defendant voluntarily went to the Bank—not

at the Bank's request but at his son's specific request. Defendant was free to leave when he chose and admittedly was not subject to any physical or economic threats. He was a wealthy, retired farmer who chose voluntarily to go to the Bank to discuss his son's affairs. This state of facts is far different than those in the case of *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985), where the guarantor testified that a bank official threatened to prosecute and jail the guarantor's son if the guarantor did not sign the guaranty.

Further, we cannot determine that there was opportunity to exercise undue influence. The meeting between defendant and the bank's employee was open, cordial, and pleasant, by defendant's own testimony.

Further, there was no evidence showing a disposition on the part of Platt, an officer and employee of the Bank, to exercise undue influence on the defendant, for an improper purpose, when defendant signed the guaranty form.

In connection with all of these matters, the defendant testified that he was not a customer of the Bank and had never met Platt before May 12, 1983. The defendant met with Platt at the request of his son, Gary. It was Platt's uncontroverted testimony that he did not call the defendant to come in and that he did not know of anyone at the Bank who called him in. The record shows that the defendant signed the guaranty in the absence of any physical or economic threats from Platt, and there were no constraints on defendant's liberty. The defendant did not testify to any statements made to him by Platt or to any other facts which would show that Platt had a disposition to exercise undue influence on the defendant for any improper purpose. Even considering the facts in a light most favorable to the defendant, defendant has failed to show any evidence of the essential elements of undue influence. The only influence on defendant appeared to be a natural desire to help his son. We conclude that as a matter of law there was insufficient evidence of undue influence, and the court was clearly wrong when it submitted that issue to the jury.

The record also shows that there was a lack of sufficient evidence of misrepresentation to submit that issue to the jury. In order to show misrepresentation, the party alleging it must

plead and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result. See *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

Defendant failed to present any evidence to show that the statements made to defendant by Platt were known to be false when made (or indeed that the statements were false at all), or were made recklessly, without knowledge of their truth and as positive assertions. Defendant's brief on appeal provides little help to determine which statements made by Platt were alleged to be a misrepresentation of facts. It appears from defendant's brief that the questionable statements made by Platt were that defendant's son, Gary, " 'would make it' " and that Gary "was getting a job." Brief for Appellee at 6. The Bank asserts in its brief on appeal that the defendant's claim of misrepresentation rests upon the following: "(1) that Mike Platt said 'he believed he [Gary Droge] . . . could come out of this all right'; (2) that Mike Platt said Gary Droge 'was going to get a job'; and (3) the failure of Mike Platt to show defendant/appellee his son's financial statements even though he didn't ask to see them." Brief for Appellant at 30. The statement by Platt that Gary "could come out of this all right" was in regard to the future success of Gary's farming operation. Platt testified that he showed the cash-flow statement to defendant and said, " 'This is where Gary's debt's at now. Looks like if things are averaged through the year,' that's what we always tried to base them on was an average crop yield and average price, 'it looks like Gary will make some progress through the year.' "

Although Platt did not show the defendant Gary's financial statement, Platt was under no obligation to do so. Defendant did not request to see it. Platt testified that the amount of Gary's debt which defendant was asked to guarantee would have been discussed at the meeting with defendant.

The statement that Gary "was going to get a job" also

concerned a future event. Generally, fraud cannot be based on predictions or expressions of mere possibilities in reference to future events. *In re Estate of Hesemann*, 214 Neb. 842, 336 N.W.2d 568 (1983). The exception to the rule is that fraud may be predicated on the representation that an event which is in control of the maker will, or will not, take place in the future, if the representation as to the future is known to be false when made, or is made in reckless disregard as to its truthfulness or falsity and the other elements of fraud are present. See *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985).

Whether Gary's farming operation would be successful and he would "come out of this all right," that is, reduce or be able to pay his debt at the Bank, was not an event which was in the control of Platt, the maker of the statement. Neither was Platt's statement that Gary "was going to get a job" an event within Platt's control.

The record shows that defendant failed to establish misrepresentation. We find that as a matter of law there was insufficient evidence of misrepresentation, and that issue should not have been submitted to the jury.

The judgment is reversed and the cause remanded with directions to enter judgment for the Bank on its petition.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., not participating.

SHADOW ISLE, INC., A CORPORATION, DOING BUSINESS AS ANKONY SHADOW ISLE RANCH, APPELLEE AND CROSS-APPELLANT, V. GRANADA FEEDING COMPANY, A DIVISION OF AFC, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

411 N.W.2d 331

Filed August 28, 1987. No. 85-729.

1. **Breach of Contract.** Where a party's breach by nonperformance contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
2. **Damages.** Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery.
3. **Damages: Proof.** A party seeking damages must offer proof which affords a basis for ascertaining their monetary value with reasonable certainty.
4. **Appeal and Error.** A party cannot complain of error when, by his own action, he has acquiesced therein.
5. **Contracts.** A contract provision is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Paul W. Snyder of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This case arises out of a controversy concerning an agreement for the use of water from two wells on the defendant's land.

The plaintiff, Shadow Isle, Inc., and the defendant, Granada Feeding Company, own adjacent tracts of land in Scotts Bluff County, Nebraska. In 1973 the predecessors in title of the parties executed a "Deed and Easement of Water Right." American Beef Packers, Inc. (American), the predecessor in title of the defendant, was the owner of the land referred to in the deed as "Tract A." Colossal Cattle Company (Colossal), the

predecessor in title of the plaintiff, was the owner of the land referred to in the deed as "Tract B."

Under the terms of the deed, American conveyed to Colossal, and its successors and assigns, the right to use water from the wells described as wells 2 and 3 and located on Tract A. Colossal, on behalf of itself, and its successors and assigns, conveyed to American, and its successors and assigns, a perpetual easement appurtenant to and running with Tract A, for the purpose of allowing the continued use of the main waterline running from well 3 over Tract B.

Paragraph 2 of the deed provides:

> 2. Both American and Colossal covenant for and on behalf of themselves, their successors and assigns and which [sic] each other and their respective successors and assigns, that both parties will at all times keep and maintain or cause to be kept and maintained the wells and the lines thereto in good order and free from contamination and *all costs of maintenance and repair on said wells and lines leading therefrom will be borne by the parties hereto*, their successors and assigns, *in the ratio that the parties hereto*, their successors and assigns, *use the water from said wells as such use is determined between the parties hereto*, their successors and assigns.

(Emphasis supplied.)

The defendant is now the owner of Tract A and the plaintiff is the owner of Tract B as referred to in the deed and easement.

On May 8, 1984, the defendant wrote to the plaintiff threatening to "disconnect our water supply going to your property" on June 1, 1984, because the plaintiff had refused to pay any of the costs of maintenance or repair of the water supply.

The plaintiff commenced this action on May 31, 1984, to enjoin the defendant from disconnecting the water supply system, to obtain a declaration of the rights and status of the plaintiff under the deed, and for such other and further relief as the court deemed just and equitable.

The defendant filed an answer and a cross-petition. In its answer, the defendant admitted the existence of the deed and the ongoing dispute regarding operational costs of the well and

water systems and denied other allegations of the petition. The defendant also alleged the plaintiff had not reimbursed it for any costs of operation, maintenance, or repair of the water supply system since July of 1978 and that the rights of the parties under the deed should be clarified and declared by the court to avoid continuing disputes between the parties. The answer prayed for a declaration of the rights of the parties under the deed and for such other and further relief as the court deemed equitable.

In its cross-petition, the defendant alleged that the plaintiff owed 30 percent of all operational, maintenance, and repair costs incurred from July 1978 to June 21, 1984, in the amount of $35,510.26.

In its answer to the cross-petition, the plaintiff denied that the defendant was entitled to relief; that it had not agreed to pay for operational costs of the water system; and that such costs were to be distinguished from costs of maintenance and repair. The plaintiff further alleged that the defendant's claim for damages prior to June 22, 1980, was barred by the statute of limitations.

The trial court found that under the deed the cost of maintenance included electrical costs of maintaining the wells; that the parties had failed to determine the ratio of use between themselves as required by the deed; that the parties should determine their respective ratio of use and the court would not determine that ratio for them; and that the plaintiff had failed to equitably determine its ratio of maintenance and repair costs for which it should reimburse the defendant, and therefore was not entitled to equitable relief. The trial court dismissed both the petition and cross-petition.

Both parties filed motions for new trial.

The defendant has appealed and has alleged three assignments of error, that the court erred (1) in refusing to resolve the dispute between the parties concerning the costs of operating, maintaining, and repairing the wells and waterlines, and in dismissing its cross-petition; (2) in not awarding it a money judgment for at least 30 percent of the costs of operating, maintaining, and repairing the wells over a period of 4 years prior to the filing of the cross-petition; and (3) in

refusing to permit Meredith C. Schaff, its expert witness, to testify.

The plaintiff has cross-appealed and has alleged four assignments of error, that the trial court erred (1) in dismissing its petition for injunctive relief before it had an opportunity to present rebuttal evidence and before it had presented its defense to the cross-petition; (2) in finding that "maintenance" included the cost of electricity to operate the pumps; (3) in admitting evidence of utility bills, repair bills, and invoices; and (4) in not finding the statute of limitations barred the defendant's claim under the cross-petition.

The first question on appeal is whether the trial court erred in dismissing the defendant's cross-petition and refusing to resolve the dispute regarding the plaintiff's liability for costs of operation, maintenance, and repair.

The trial court based its decision on the fact that the parties had failed to determine the ratio of water use between themselves. Clearly, there was a dispute as to the plaintiff's liability for the cost of water supplied to it by the defendant. The defendant's May 8, 1984, demand letter was incorporated into both parties' pleadings and was received in evidence. The letter provided as follows:

> Since 1980 we have attempted to determine with you an equitable solution to the water supply situation at your Minatare property. We have accepted your excuses for being unable to deal with the problem and we have patiently provided your operation with a water supply from our wells for almost 5 years. We have billed you for only 1/3 of the power cost of operating the wells which we have been willing to accept as compensation for our cost. We have not billed you for any of our repair, capital or replacement costs in maintaining the water supply, which we believe you clearly owe us. At no time have you offered any compensation to us for the water you use each day. Our billings to you have been ignored to the extent that 1/3 of electrical cost for the pumps supplying water to your property amounts to $32,206.34 through April 1, 1984.
>
> We have delayed pressing the matter on several

> occasions because each time you needed more time to present a solution. We will not wait beyond June 1, 1984. Be advised that on June 1, 1984 we will begin to disconnect our water supply going to your property.
>
> We also will pursue collection of the amount we believe you owe us on the water services we have supplied in the past.

The defendant's manager testified that when the dispute first arose in 1980, the defendant considered putting flow meters on the wells, but did not do so because both parties talked of settling the matter.

The record shows that it was the plaintiff which was unwilling to work with the defendant to determine the parties' ratio of water use. On the other hand, the defendant persisted in its efforts to resolve the matter for some 4 or 5 years before concluding that the plaintiff's water usage approximated 30 percent.

The Restatement (Second) of Contracts § 245 at 258 (1981) provides: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." Comment *a.* to that section indicates at 258:

> Where a duty of one party is subject to the occurrence of a condition, the additional duty of good faith and fair dealing imposed on him under § 205 may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence. Under § 235(2), non-performance of that duty when performance is due is a breach. . . . Under this Section it has the further effect of excusing the non-occurrence of the condition itself, so that performance of the duty that was originally subject to its occurrence can become due in spite of its non-occurrence. . . .

In this case, the plaintiff did not try in good faith to determine its ratio of water use with the defendant. Despite the supposed efforts of the plaintiff to resolve the matter, the evidence does not show that it ever offered a solution or that it reimbursed the defendant for any of its expenses of operating,

maintaining, or repairing the wells. The evidence supports a finding that the provision requiring the parties to determine their respective ratio of water use between themselves should have been excused. The plaintiff did not use good faith in an effort to reach such a determination. The defendant could not be expected to reach a ratio determination with the plaintiff when the plaintiff refused to cooperate.

If there had been sufficient evidence, the trial court should have determined the ratio of water use between the parties and determined the amount due the defendant under the deed.

Next, the defendant contends that it should have been awarded a judgment for 30 percent of its costs of operating, maintaining, and repairing the wells which provided water to the plaintiff.

The plaintiff contends the defendant's proof of damages was too uncertain to permit any recovery of damages. There was no direct evidence of the amount of water used by either party. There was evidence that prior to mid-June 1984, the defendant supplied all of the water used by the plaintiff on Tract B. There was some evidence of the parties' respective uses of water on the two tracts and some evidence of the relative sizes of the cattle feeding and other agricultural operations on both tracts. The defendant presented evidence of repair bills and operational costs of the wells supplying water to the two tracts. However, there was no evidence from which a satisfactory calculation could be made as to the amount due the defendant from the plaintiff.

Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery. See, *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974); *Sherman v. Travelers Ind. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975); *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975).

A party seeking damages must offer proof which affords a basis for ascertaining their monetary value with reasonable certainty. *Siefford v. Housing Authority, supra.*

Since there was a failure of proof, the defendant was not entitled to recover any damages. It is unnecessary to consider the defendant's third assignment of error.

As to the cross-appeal, the plaintiff first contends that it was prejudiced because it was not permitted to offer rebuttal evidence or present a defense to the cross-petition. Specifically, the plaintiff claims it should have been allowed to offer proof that it had done equity and had "clean hands."

At the trial the plaintiff offered three exhibits and then rested. The defendant then presented its evidence. When the plaintiff was asked if it had any rebuttal, it responded that it had a motion. The plaintiff then moved for a directed verdict on the cross-petition. The defendant moved to withdraw its rest in order to offer an exhibit regarding repair costs, which had been discussed but not offered in evidence. The exhibit was then offered and received over the plaintiff's objection. The trial court then asked the defendant, "Do you renew your rest now and want to go ahead with the argument?" The defendant responded affirmatively. The record does not show any objection by the plaintiff. The record shows no ruling upon the motion for a directed verdict. Counsel then proceeded with argument. No further proceedings are shown.

"A party cannot complain of error when, by his own action, he has acquiesced therein." *Langenheim v. City of Seward*, 200 Neb. 740, 747, 265 N.W.2d 446, 451 (1978). The plaintiff may not complain now of the procedure below, since it made no objection.

The plaintiff next contends the trial court erred in holding electrical costs of maintaining the wells are included in maintenance costs under the deed and easement.

A written contract is not subject to interpretation or construction where the language of the contract is unambiguous. *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983). In *Pawnee Plastics, Inc. v. American Savings Co.*, 210 Neb. 131, 133, 313 N.W.2d 262, 264 (1981), we held that a contract provision "is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one."

In addition to paragraph 2, the deed reflects that Tract A has water wells; the owner of Tract B has utilized water from those wells for many years and will continue to have a need for it; and

the parties' predecessors in title wished to set in writing the terms of the water right being conveyed so that the owners of Tracts A and B could rely on the same.

Nowhere in the deed are operational costs expressly discussed. Nevertheless, the clear implication of the contractual provisions is that the parties to the contract contemplated that the water system would be operational.

Insurance Co. v. Wayne, 75 Ohio St. 451, 80 N.E. 13 (1907), involved litigation pertaining to a contract which provided for the allocation of maintenance and repair costs of certain improvements benefiting adjacent buildings. The plaintiff sought money under the contract for costs of maintaining and repairing an elevator. The court determined that operational costs of the elevator were included within maintenance costs, in part because the contract as a whole contemplated that the elevator would be operational.

In *Romney v. Improvement Co.*, 122 W. Va. 608, 609, 11 S.E.2d 758, 758-59 (1940), the court stated in regard to a franchise agreement for a sewage system: "The definers, generally, concur that costs properly allocated to maintenance of property, include all expenses reasonably necessary to its sustention. Operation and maintenance cover the same expenditures." See, also, *Boston, Petitioner*, 221 Mass. 468, 109 N.E. 389 (1915).

Since the deed in the case at bar clearly contemplated operation of the water system, we believe that paragraph 2 presented an ambiguity subject to construction. Like the courts in *Insurance Co., supra* and *Romney, supra*, we interpret the language to mean that operational costs of the water system are included in the term "maintenance." If the water system is not maintained in an operational state, the deed and easement have no purpose or effect.

It is unnecessary to consider the plaintiff's other assignments of error.

The judgment dismissing the petition and cross-petition is affirmed.

AFFIRMED.

JAMES BERGMAN, A MINOR, BY HIS NEXT FRIEND AND MOTHER, PHYLLIS HARRE, APPELLEE, V. ROYCE ANDERSON, APPELLANT.

411 N.W.2d 336

Filed August 28, 1987. No. 85-825.

1. **Torts: Battery: Assault: Intent: Words and Phrases.** Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
2. **Torts: Battery: Words and Phrases.** A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
3. **Torts: Assault: Intent: Words and Phrases.** An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
4. **Torts: Battery: Assault: Intent: Words and Phrases.** The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
5. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
6. **Torts: Liability.** As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
7. **Pleadings: Actions.** Under a code system of pleading, such as that in Nebraska, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Gregory R. Abboud, for appellant.

Raymond J. Hasiak, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On the evening of October 16, 1983, James Bergman and his girlfriend stopped at a gas station near 84th Street and West Center Road in Omaha. As Bergman started to drive from the gas station, Royce Anderson drove into the station and parked his van in front of Bergman's car, blocking Bergman's exit. Anderson got out of his van and was accompanied by his three teenage sons and four of their friends. Anderson and his teenage companions, carrying baseball bats, approached Bergman's automobile and began beating on the hood with their bats. Anderson's group had been tracking Bergman because of a previous dispute between Bergman and one of Anderson's sons. After someone broke out the driver's side window, Anderson reached into the car, grabbed Bergman around the neck, and pulled him out of the car and onto the pavement. Anderson punched Bergman in the back of the neck and jaw and held Bergman down on the pavement while Anderson's companions kicked him. At trial, Anderson denied hitting Bergman, but claimed his actions in pulling Bergman out of the car were to protect him from the seven other individuals. As a result of the attack, Bergman was left bleeding from his nose and mouth and sustained injuries to his head and back. Bergman's car also sustained damage, including a broken windshield, broken headlights, and numerous dents.

In his petition, Bergman alleged:

> That on the 16th day of October, 1983 at the vicinity of 84th and Center Streets the Defendant and certain minor children under the Defendant's direction did unlawfully and without provication [sic] did assault the Plaintiff by striking him on the head and grabbing him behind the head and dragging him out of the car. After being dragged out of the car the Plaintiff was struck again by the Defendant on the head and side. As . . . a result of the assault by the Defendant and minors under the Defendant's direction the Plaintiff has suffered severe pain and mental anguish and the Plaintiffs [sic] body was badly bruised and injured.

Bergman also alleged in his petition that as a consequence of the attack, he incurred medical expenses in the amount of

$216.55 and repair costs to his automobile in the amount of $923. At trial, a witness, testifying on behalf of Bergman and over Anderson's objection, testified that the actual repair cost would be approximately $2,000. Bergman requested that the court enter judgment for the specifically enumerated amounts, as well as for damages for mental anguish and pain and suffering.

After Bergman adduced evidence, Anderson unsuccessfully moved for a directed verdict, alleging that Bergman's petition failed to state a cause of action under the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery. Following the adduction of evidence, the trial court, over objection, gave the following "assault" and "battery" instruction:

> "Assault" may be defined as a wrongful offer or attempt, with unlawful force or threats, made in a menacing manner, to inflict bodily injury upon another, with the present apparent ability to give effect to the attempt.
>
> "Battery" may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent. The word "battery" also includes within its meaning "assault" as above defined.
>
> Any unlawful or unjustified striking of another is an assault and battery, for the direct consequences of which the party guilty thereof is liable in damages.

Over Anderson's objection, the court also instructed the jury on the theory of aiding and abetting, using an instruction substantially similar to that contained in NJI 14.12, and providing in part:

> Aiding and abetting involves some participation in the unlawful act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the unlawful act is taken or that there was an express agreement therefor. *Mere encouragement or assistance is sufficient.*

(Emphasis supplied.) Following jury deliberation, the jury returned a general verdict, on which judgment was entered, in the amount of $8,000.

Anderson now appeals to this court and alleges that the district court erred in (1) instructing the jury on the definitions of "assault" and "battery"; (2) allowing the jury to be instructed on the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery, when Bergman's petition does not allege such theory; (3) instructing the jury regarding a definition of aiding and abetting; and (4) allowing Bergman's witness to testify as to the repair cost of Bergman's car in an amount in excess of the cost of repair pled in Bergman's petition.

Regarding Anderson's first assignment of error, Anderson contends that the trial court incorrectly instructed the jury regarding the law of "assault and battery" and that his tendered instruction, "[t]hat assult [sic] and battery is a physical touching with intent to inflict bodily injury," should have been given.

First, Anderson misinterprets the law regarding the intentional torts of battery and assault. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another. See Prosser and Keeton on the Law of Torts, *Intentional Interference with the Person* §§ 8 through 10 (5th ed. 1984). A battery requires "an actual infliction" of an unconsented injury upon or unconsented contact with another. See *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948). In contrast, we have characterized the intentional tort of assault as a " 'wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt,' " without requiring that the one assaulted be subjected to any actual physical injury or contact. *Crouter v. Rogers*, 193 Neb. 497, 499, 227 N.W.2d 845, 847 (1975). See Prosser and Keeton, *supra* at § 10 (no actual contact is necessary to establish the intentional tort of assault). See, also, 6 Am. Jur. 2d *Assault and Battery* § 3 (1963); 6A C.J.S. *Assault & Battery* §§ 3 and 4 (1975). To the extent Anderson's tendered instruction treated battery and assault as one and the same, which they are not, such tendered instruction was an incorrect statement of the law, which was properly rejected by the trial court.

Second, Anderson contends that "intent to cause bodily injury," necessary for proper instruction regarding an assault, see *Crouter v. Rogers, supra*, was omitted from the instruction given by the trial court. Both the intentional tort of battery and the intentional tort of assault require an intent which may be shown by proof that the defendant intended to physically injure or contact another or intended to cause apprehension that such physical injury or contact is imminent. See Prosser and Keeton, *supra* at §§ 9 and 10. However, such intent contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery. See *Morfeld v. Weidner*, 99 Neb. 49, 154 N.W. 860 (1915). Cf. *State v. Ristau*, 201 Neb. 784, 786, 272 N.W.2d 274, 276 (1978), "It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated." The trial court's instruction on "assault" included the language "wrongful offer or attempt" at an "unlawful or unjustified striking of another." In its ordinary use, an offer includes "an action or movement indicating a purpose or intention of doing something." Webster's Third New International Dictionary, Unabridged 1566 (1981).

> "Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. . . . ' " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " ' "

State v. Copple, 224 Neb. 672, 699, 401 N.W.2d 141, 159 (1987). See, also, *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). Reviewing the instructions as a whole, we find that the jury was correctly instructed concerning the element of intent required in the tort of assault.

Regarding Anderson's second and third assignments of error, because they both relate to questions regarding the same legal theory, we address them conjunctively.

> Plaintiffs-Appellants invoke the settled principles of law covering concerted wrongful action: that in addition to persons who actually participate in an assault and battery, persons who aid, abet, or procure the commission thereof, are subject to a civil action therefor; that on the theory that the act of one is the act of all, the rule of joint and several liability of tort feasors prevails where the tort feasors act in concert or unity of action, and, therefore, applies to tort feasors who intentionally unite in the wrongful act or who are present, assist, or participate therein; and that where two or more persons engage in a common enterprise, they are jointly liable for wrongful acts done in connection with that enterprise, at least where the enterprise is an unlawful one, in which case all are answerable for any injury done by any one of them, although the damage done was greater than was foreseen or the particular act done was not contemplated or intended by them.

Thompson v. Johnson, 180 F.2d 431, 433-34 (5th Cir. 1950). See Prosser and Keeton on the Law of Torts, *Joint Tortfeasors* § 46 (5th ed. 1984). As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage. See, *Dickinson v. Lawson*, 125 Neb. 646, 251 N.W. 656 (1933); 74 Am. Jur. 2d *Torts* § 66 (1974). See, also, *Acree v. North*, 110 Neb. 92, 192 N.W. 947 (1923); *Cooney v. Burke*, 11 Neb. 258, 9 N.W. 57 (1881).

Anderson contends that Bergman's petition failed to state a cause of action based on the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery on Bergman.

> The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. Gerard v. Steinbock, 169 Neb. 828, 101 N.W.2d 194. An objection to the introduction of any evidence on

> the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained. Gerard v. Steinbock, *supra*.
>
> Where the objection is not made until after the trial has commenced, the petition will be liberally construed and sustained if possible. Welch v. Adams, 87 Neb. 681, 127 N.W. 1064; Elvidge v. Brant, 131 Neb. 1, 267 N.W. 169. The petition will be liberally construed in the light of the entire record; and if the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient. Dickinson v. Lawson, 125 Neb. 646, 251 N.W. 656; Bradway v. Higgins, 152 Neb. 724, 42 N.W.2d 627; Goger v. Voecks, 156 Neb. 696, 57 N.W.2d 621. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. [Neb. Rev. Stat.] § 25-853 [(Reissue 1985)]; Dickinson v. Lawson, *supra*.

Gibbs v. Johns, 183 Neb. 618, 619-20, 163 N.W.2d 110, 111 (1968). See, also, *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977). "Under a code system of pleading, such as Nebraska's, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery." *Parriott v. Drainage Dist. No. 6, ante* p. 123, 126, 410 N.W.2d 97, 100 (1987). See *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Bergman's petition specifically alleged that those attacking Bergman were under Anderson's "direction," and such allegation permits the inference that Anderson actively assisted, participated, and aided and abetted in the attack on Bergman. We conclude, upon our review of the pleadings, that Bergman stated sufficient facts to support a theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery.

Anderson also complains that the court's instruction on aiding and abetting was incorrect. In particular, Anderson contends that " '[m]ere encouragement or assistance' " in the commission of the unlawful act is not sufficient, but that the definitional "standard" is one of "substantial" encouragement

or assistance. Brief for Appellant at 11. In this case, the trial court adapted NJI 14.12, an instruction in a prosecution for a criminal offense, for use as an instruction in a civil action. Presently, under our criminal law, the standard requiring "mere encouragement or assistance" in commission of a criminal act is sufficient to impose criminal liability for "aiding and abetting." See, *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). We decline to adopt a more stringent standard in our tort law than that which presently prevails in our criminal law. Therefore, we find that the trial court properly instructed the jury regarding Anderson's acting in concert with and aiding and abetting others in the commission of an assault or battery on Bergman.

Finally, we address Anderson's fourth and last assignment of error. We note that the jury returned a general verdict in favor of Bergman. We are unable to determine what part or amount, if any, of the verdict represents property damage concerning Bergman's car. The cost of repair to Bergman's car, as an item of damage, may or may not be included in the amount of the general verdict and, under the circumstances, cannot be separated from the other damages awarded by the jury. Thus, we are unable to determine whether the jury actually awarded to Bergman property damage in excess of the amount stated in Bergman's petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN DWYER, APPELLANT.
411 N.W.2d 341

Filed August 28, 1987. No. 86-961.

1. **Directed Verdict: Convictions.** In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.

2. **Verdicts: Appeal and Error.** A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
3. **Criminal Law: Robbery.** Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Richard L. Schmeling, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Defendant, John Dwyer, appeals his jury convictions in the district court for Lancaster County on one count of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and one count of use of a weapon during the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). The defendant was sentenced to the state Department of Correctional Services for a term of 2 to 4 years on each count, with the sentences to be served consecutively. On appeal, the defendant assigns as error the trial court's failure to grant defendant's motions to dismiss at the close of the State's case and again at the close of all the evidence and alleges the verdicts of the jury are contrary to law and to the evidence. The defendant further alleges the court erred in preventing the defendant from introducing testimony concerning drug dealings between the victim and the two codefendants for purposes of impeachment and in failing to sustain defendant's objection as to testimony concerning the amount of money the victim paid for the marijuana which was taken from him. Finally, the defendant alleges the district court erred in giving instruction No. 9 over objection of the defendant and in failing to give two of defendant's proposed instructions. For the reasons hereafter stated, the judgment and sentences of the district court are affirmed.

There is little dispute concerning the events leading up to and

including the robbery. The record shows that Allen Bennett, the complaining witness, was residing at 421 Main Street, apartment No. 1, in Hickman, Lancaster County, Nebraska, at the time of the robbery. Bennett suffers from muscular dystrophy, has no use of his legs, has limited use of his arms, and is confined to a wheelchair, which he operates by using a hand control on the arm of the chair. Bennett testified that on the evening of March 11, 1986, he was at home in his apartment, watching television. The door to his apartment was unlocked. At approximately 7 p.m., three people wearing ski masks, later identified as defendant John Dwyer, James Rosenkrans, and Timothy Tuttle, burst into his apartment. At the time the three entered the apartment Bennett did not know who they were. One of the three moved behind the witness, pulled back the witness' head, and told him to be quiet, to keep still, and he would not get hurt. Bennett saw one of the intruders holding a "black stiletto type knife" with a blade length of approximately 6 to 8 inches. The individual standing behind Bennett placed electrical tape over Bennett's mouth and disabled his wheelchair by releasing the pulleys on the sides of the wheels. The defendant, who was later identified as the individual holding the knife, moved in front of the witness and held the knife to his throat. Rosenkrans and Tuttle searched through Bennett's desk. The ordeal lasted approximately 30 seconds, during which time the witness was repeatedly told to keep quiet and he would not get hurt. After Rosenkrans and Tuttle found what they were looking for, the three intruders left the apartment, leaving Bennett stranded in his wheelchair. Bennett was able to remove the tape from his mouth and call for help. Several residents of the apartment building responded to Bennett's call. Bennett related to them the events of the robbery.

Initially, Bennett was unable to determine whether or not anything was missing, and felt something had gone wrong and the intruders were scared off. However, Bennett later discovered that a bag containing approximately 2 1/2 ounces of marijuana had been taken from his desk.

Approximately 20 minutes after the robbery, a sheriff's deputy arrived at the scene. Bennett told the deputy generally what had happened, but instead of reporting that marijuana

had been stolen, he told the deputy that the intruders had stolen cash in the amount of $325. This amount was the sum Bennett paid for 4 ounces of marijuana approximately 2 weeks prior to the robbery. Some months later, Bennett called the police and admitted to the falsity of the initial report and told the investigators that marijuana, rather than money, had been stolen.

The three men involved in the robbery were subsequently arrested and charged with robbery and use of a weapon during the commission of a felony. On September 10, 1986, the codefendant Rosenkrans entered into a plea agreement under which Rosenkrans entered a plea of no contest to a charge of attempted robbery. On September 11, 1986, the codefendant Timothy Tuttle entered into a plea agreement under which Tuttle pled guilty to attempted robbery. Neither codefendant was required, under the terms of the agreements, to testify against the defendant.

At the defendant's trial, the State adduced the testimony of the managers of the apartment building, who were Douglas and Debra Rosenkrans, the brother and sister-in-law of James Rosenkrans. They testified that during the early evening of March 10, 1986, they observed three men, one of whom was wearing a ski mask, "hanging around" the apartment building. They saw the three men in a vehicle bearing the license number 2-G7771, which was registered to James Rosenkrans, talked to them, and identified them as Tuttle, James Rosenkrans, and the defendant, who was the person wearing the ski mask.

At about 7 p.m. the night of the robbery, a resident of the apartment building saw James Rosenkrans and two other persons, whom he did not know, in the apartment building. James Rosenkrans testified that he took part in the March 11 robbery of Bennett and that defendant also participated. The testimony of this witness generally corroborated that of Bennett and that of the managers of the apartment building. Defendant did not testify.

At the conclusion of the trial, the jury returned a verdict of guilty on each count. The defendant was sentenced to the state Department of Correctional Services. Defendant timely appealed to this court.

In his appeal, the defendant alleges that the verdicts are contrary to the law and the evidence and that the court erred in failing to sustain the defendant's motions to dismiss, motions which for the purpose of this case will be treated as motions for a directed verdict. In Nebraska, it has been held that a trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained. *State v. Meints*, 225 Neb. 335, 405 N.W.2d 15 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Those determinations are within the province of the jury. *State v. Meints, supra; State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict. *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

It has been shown that the facts concerning the alleged robbery are not in dispute. Defense counsel makes no attempt to show that the defendant was not involved in the events which took place on March 11, 1986. The only point the defendant argues on appeal is whether the property stolen in the present case, marijuana, has any value as contemplated by the robbery statute, § 28-324(1). That statute states, "A person commits robbery if, with intent to steal, he forcibly and by violence . . . takes from the person of another any money or personal property of any value whatever." Defendant contends that marijuana is a controlled substance, that possession of marijuana is illegal, and that therefore marijuana has no legal value and cannot be the subject of robbery, in the absence of specific statutory provisions to the contrary. The defendant specifically refers to the failure of the Legislature to include language defining contraband as property in the robbery statute, although such language appears in the theft statute, Neb. Rev. Stat. § 28-509(6) (Reissue 1985). While we agree with

the defendant that marijuana is a controlled substance and possession thereof subjects one to criminal penalties, we do not agree that it has no value for purposes of the robbery statute. Robbery is classified in our statutes as an offense against the person, and the focus in the statutes forbidding such claim is on the protection of the victim rather than the monetary value of the item taken. See *Hairston v. Com.*, 2 Va. App. 211, 343 S.E.2d 355 (1986). The lack of monetary or intrinsic value of property is not a defense to a prosecution for robbery. *People v. Greene*, 129 Misc. 2d 1008, 495 N.Y.S.2d 600 (1985). See, also, *State v. Gomez*, 234 Kan. 447, 673 P.2d 1160 (1983). The fact that the item stolen may have been contraband and cannot have legal value does not alter the situation. The taking of contraband by force is subject to penal sanction. *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal Rptr. 390 (1983); *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961).

Defendant cites *People v. Spencer*, 54 Cal. App. 54, 201 P. 130 (1921), to the effect that intoxicating liquor could not be the subject of robbery because it was an illegal substance. Defendant admits that the *Spencer* case was later "eroded" by *People v. Bailey*, 82 Cal. App. 700, 256 P. 281 (1927). We rely on the California Supreme Court statement in *People v. Dillon, supra* at 457 n.5, 668 P.2d at 704 n.5, 194 Cal. Rptr. at 397 n.5, where the court stated:

> Defendant apparently concedes that robbery of contraband is subject to penal sanction. California was for some time the only jurisdiction to adhere to a contrary rule (*People v. Spencer* (1921) 54 Cal.App. 54, 301 P. 130), but our court has long since agreed to the overruling of this aberrant precedent. (*People v. Odenwald* (1930) 104 Cal.App. 203, 211-212, 285 P. 406, 286 P. 161 [opn. on den. of hg.].) Today the rule is universal that by prohibiting possession of an item, the government does not license criminals to take it by force or stealth from other criminals.

We agree. Robbery of contraband may be subject to the penal sanction of § 28-324. In the present case the marijuana, although contraband, could be the subject of robbery if shown to have "any value whatever." The court, when considering the

defendant's first motion to dismiss, stated, "It would be the height of naivete . . . to believe that the property that was taken in this robbery did not have a value when it is common knowledge that drugs are illegally sold upon the street . . . and that money can be had for that item." The court later found that there was sufficient evidence from which the jury could conclude that the marijuana taken from Bennett had a value of approximately $202. Defendant's contention that the verdict is contrary to the law and evidence in that marijuana has no value and cannot be the subject of a robbery is without merit.

Defendant assigns as error the refusal of the trial court to permit defendant to impeach Bennett's credibility by testimony "concerning drug dealings between the victim and two of the co-defendants in order to impeach the credibility of the victim's testimony." Examination of the record shows that the court permitted much cross-examination of Bennett concerning prior sales of marijuana to James Rosenkrans in the presence of Tuttle, but did not permit defendant's attempt to show that Rosenkrans had purchased Valium from Bennett. The court determined such evidence was irrelevant. We agree.

Other errors are assigned in the giving or refusing of certain instructions, but these errors are not discussed. We have held that a party who claims error in a proceeding is required to point out the factual and legal basis that shows the error. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In the event the assignments of error are not supported by accompanying arguments in the brief, but are only statements of general dissatisfaction with the conclusion reached by the trial court, this court will not speculate in regard to the reasoning behind the defendant's dissatisfaction. *State v. Copple, supra; Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

There is no error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN L. MOORE, APPELLANT.

411 N.W.2d 345

Filed August 28, 1987. No. 86-1045.

1. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
2. **Arrests: Police Officers and Sheriffs: Probable Cause.** The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dorothy A. Walker of Mowbray, Chapin & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Melvin L. Moore appeals his convictions for disturbing the peace and quiet of others, a violation of Lincoln Mun. Code § 9.52.030 (1984), and resisting arrest, a violation of Lincoln Mun. Code § 9.12.040 (1984). We affirm.

At approximately 1 a.m. on July 29, 1986, Lincoln Police

Officer Don L. Marti responded to a complaint of a disturbance at a house identified as 615 South 21st Street, in a Lincoln residential neighborhood. On arrival at the scene, Marti initially stopped his cruiser 75 to 100 feet away from the house and heard noise coming from the house's front yard, that is, people talking and laughing very loudly in what Officer Marti characterized as "party noise." Marti then stopped his cruiser on the street in front of the house, but could not see the individuals who were making the noise, since they were in a darkened part of the yard. When he had stopped his cruiser, Officer Marti shined the cruiser's spotlight on the front of the house, lighting the area where the individuals were standing, and then observed four males in the front yard, who were drinking from some unidentifiable type of beverage bottles.

As Officer Marti was getting out of his cruiser, Moore ran up to the cruiser and yelled, "What the fuck are you doing here? You've got no business here. Get the fuck out of here." Officer Marti testified that Moore

> continued to yell at me and I finished getting out of my cruiser and he was right up in my face. It was difficult to get out of my car, in fact. And I explained or tried to explain to the defendant that I was there on a disturbance call which seemed to even make him madder. . . . And I asked him for some identification and he refused to do that. And he kept yelling at me.

Moore continued "yelling and screaming" and "flailing his arms around" as Officer Lyle A. Lacy, another Lincoln policeman dispatched on the disturbance call, arrived at the scene. Officer Lacy tried to calm Moore and asked him to move away from Officer Marti so that Officer Lacy could speak with Moore. Officer Lacy attempted to move Moore away from Officer Marti on at least three occasions, but Moore kept running back to Officer Marti, yelling at him and poking his finger in Marti's face. Officer Marti described the incident:

> Finally, I think maybe the second or third time that he came running back at me and poking his finger in my face yelling, I told Mr. Moore that he was under arrest and he stated, "Don't touch me," and started to back away. I followed Mr. Moore for a few steps. I told him he was

> under arrest and I reached out and I grabbed ahold of his left arm. At which time Mr. Moore grabbed me by the front of the shirt with one arm and by the neck with his other hand. And at that point the fight was really on. We grappled with Mr. Moore and the other three parties who were in the front yard started grabbing onto us. And other people came from outside — from inside the house and began grabbing onto us. We called for additional units. And I would say maybe two to three minutes elapsed before other units could get there. At which time the majority of the other people retreated inside the house and locked the door. And Mr. Moore was finally subdued and placed in the cruiser by Officer Lacy.

Officer Lacy testified that Officer Marti "told Mr. Moore he was under arrest for disturbing the peace." Immediately after such statement to Moore, "Officer Marti put his hand out and touched Mr. Moore on the arm," as testified by Officer Lacy. Both officers were in police uniform during their contact with Moore.

After finding Moore guilty of disturbing the peace and resisting arrest, the trial court sentenced Moore to pay fines of $10 and $75, respectively, on the convictions. On appeal to the district court for Lancaster County, Moore's convictions and sentences were affirmed. Moore appeals his convictions to this court, assigning as error and arguing that the municipal ordinances under which he was convicted are constitutionally invalid; that his conviction for resisting arrest was contrary to the Nebraska statutory scheme governing justification for use of force; that his conviction for disturbing the peace was based solely upon speech which is protected by the 1st and 14th amendments to the U.S. Constitution; and that there was insufficient evidence as a matter of law to sustain his convictions beyond a reasonable doubt.

While Moore claims that the municipal ordinances under which he was convicted are unconstitutional, the question of constitutionality of those ordinances was not presented to the trial court and, therefore, will not be considered on appeal. "Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been

properly raised in the trial court. If not so raised, it will be considered to have been waived." *State v. Brand*, 219 Neb. 402, 404, 363 N.W.2d 516, 518 (1985). See, also, *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986); *State v. Hunter*, 219 Neb. 850, 367 N.W.2d 122 (1985); *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984). Although Moore did not question the constitutionality of the ordinances during his trial, Moore contends that the constitutionality issue was raised during his appeal to the district court and, therefore, should be addressed by this court. A similar contention was rejected in *State v. Kaiser, supra*, where we stated at 558, 356 N.W.2d at 892:

> The fallacy with this argument, however, is that appeals in criminal matters from the municipal court to the district court are not reviewed de novo upon the record; rather, they are reviewed "for error appearing on the record made in the county or municipal court." Neb. Rev. Stat. § 24-541.06(1) [Reissue 1985] . . . . The district court in the instant case was functioning as an appellate court and not as a trial court; thus, it was restricted in its review to the record made in the lower court.

(Citations omitted.) See, also, *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987); *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987); *State v. Daniels*, 224 Neb. 264, 397 N.W.2d 631 (1986); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

Neb. Rev. Stat. § 28-1412 (Reissue 1985) states in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
>
> (2) The use of force is not justifiable under this section unless:
>
> (a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
>
> (b) When the arrest is made under a warrant, the

warrant is valid or believed by the actor to be valid.

Neb. Rev. Stat. § 28-1409 (Reissue 1985) states in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> (2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.

Moore argues that Officer Marti initiated the use of force by grabbing Moore's arm, that Officer Marti did not advise Moore as to the reason for his arrest, and that the use of force in law enforcement is justifiable only if the arrest is made under a warrant. Moore's arguments are unpersuasive. Officer Marti's contact with Moore consisted of official restraint in connection with the announced arrest for disturbing the peace and prevention of Moore's departure from Marti, the arresting officer. Any of Officer Marti's additional physical contact with Moore was, under the circumstances, force justifiable in defense of Moore's assault on the officer.

Although Officer Marti did not have an arrest warrant for Moore, the arrest of Moore was lawful.

> The lawfulness of an arrest without a warrant must be based on probable cause, which exists where "facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Harrison*, 218 Neb. 532, 535, 357 N.W.2d 201, 204 (1984). . . . "If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists." *State v. Hack and Callans*, 212 Neb. 406, 408, 322 N.W.2d 806, 808 (1982). Thus, the key to a lawful arrest without a warrant is reasonable or probable cause that a person has committed a crime.

State v. Roggenkamp, 224 Neb. 914, 919, 402 N.W.2d 682, 686

(1987). On the facts known to Officer Marti at the time of the arrest, there was probable cause to believe that Moore had committed the offense of disturbing the peace.

Officer Marti's use of force was justified and authorized under § 28-1412. Moore was informed of the reason for Officer Marti's presence at the scene and was later informed of the reason for the arrest by Officer Marti. Also, under the circumstances presented in this case, the force used by Moore was clearly prohibited by § 28-1409(2), inasmuch as Moore knew that the arrest was being made by a peace officer. Moore's assignment of error regarding Officer Marti's lack of justification for use of force and justification for Moore's use of force is without merit.

Moore argues that his conviction for disturbing the peace was based solely upon speech which is protected by the 1st and 14th amendments to the U.S. Constitution. Nothing in the record supports Moore's claim that he was arrested for disturbing the peace solely as the result of his using the word "fuck" while yelling at Officer Marti. We need not, and do not, decide whether Moore's use of such word under the circumstances was constitutionally protected speech. The record clearly shows that the basis for Moore's arrest for disturbing the peace was his conduct in the presence of Officer Marti, such as yelling at, threatening, and violently arguing with the officer. Moore's assignment of error concerning a claim of protected speech has no merit.

Moore's final assignment of error is that there was insufficient evidence to support his convictions.

> [I]n determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . . Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn

such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *State v. Schroder*, 218 Neb. 860, 869-70, 359 N.W.2d 799, 806 (1984). There is sufficient evidence to sustain Moore's convictions, and, therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT EARL RIVERS, APPELLANT.
411 N.W.2d 350

Filed August 28, 1987. No. 86-1080.

1. **Postconviction.** When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
3. _____: _____. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
4. **Postconviction.** Although an evidentiary hearing is not always necessary on an application for postconviction relief, such a hearing is usually advisable to avoid protracted litigation.
5. **Pleas.** A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
6. **Effectiveness of Counsel.** This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. Additionally, the defendant must show that there is a reasonable probability that but for the attorney's error the result of the case would have been different.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

E. Michael Slattery of Case, Reinsch & Slattery, P.C., for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a postconviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Defendant, Robert Earl Rivers, appeals an order denying him an evidentiary hearing and postconviction relief, claiming an evidentiary hearing was required upon his motion that contained factual allegations which, if proved, constituted a violation or infringement of constitutional rights, and citing *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985).

We note that a further statement of the *Malek* rule includes: "When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required." *State v. Bean*, 224 Neb. 278, 280, 398 N.W.2d 104, 107 (1986). Such files and records include the presentence report. *State v. Waterman*, 215 Neb. 768, 340 N.W.2d 438 (1983).

On December 29, 1983, Rivers entered a plea of guilty to one count of first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985), the victim being under 16 years of age. On August 23, 1984, a sentence of not less than 5 and not more than 9 years was imposed, to be served in the Nebraska Penal and Correctional Complex. There was no direct appeal. Rivers was represented by attorney Oliver Pollak, of Omaha, Nebraska. We affirm.

On July 16, 1983, defendant Rivers, age 35 years, was residing at a trailer court in Eagle, Cass County, Nebraska, with his wife, Janette, and her two daughters, Marjie, age 15 years, and Cheri, age 13 years. About 8 p.m., Rivers suggested to Marjie that they go out to the edge of town, and Marjie agreed. She rode her moped, and Rivers followed in his car. They went to a secluded place under a mulberry tree, where Marjie voluntarily removed her clothing and Rivers had anal intercourse with her. Marjie returned to the family home, where she showered and changed clothing. Soon, Janette became suspicious, and after some questioning, Marjie admitted the assault. Janette telephoned the State Patrol; Officer B.L.

Hobbs responded, and later placed Rivers under arrest. Both Marjie and Rivers had berry stains on their person. When first interviewed, Rivers denied the assault, but admitted being at the assault scene with Marjie and took the officer there. He explained the berry stains resulted from their falling down. The next day, still denying the July 16 assault, Rivers told officers that he had had prior anal intercourse with Marjie in the last 2 or 3 years. Marjie later confirmed this to an officer by saying that there had been several acts, the last being in October 1982.

Prior to accepting Rivers' guilty plea, the trial judge conducted an extensive allocution with Rivers, in full compliance with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

At the time of sentencing, the trial judge reviewed a lengthy presentence report prepared by a state probation officer that included (1) Rivers' criminal record, beginning in 1965, showing more than 35 arrests, mostly alcohol-related, and two prior felony convictions, (2) copies of interviews and signed statements of Rivers, his wife, Janette, and his stepdaughter, Marjie, (3) numerous letters and copies of letters between Rivers and his former wife, Janette (their divorce became final in August 1983), showing a continued family bond between them and hope for reconciliation, and (4) an August 3, 1983, report from the Nebraska State Patrol laboratory that semen was identified in the anal specimens taken from Marjie.

On June 3, 1986, while still confined, Rivers filed a motion to vacate judgment. The court appointed E. Michael Slattery, attorney, of Plattsmouth, Nebraska, as counsel for Rivers. On September 16, 1986, Rivers filed a verified amended motion to vacate judgment, alleging numerous errors that we summarize as follows: (1) *ineffective counsel*, because Pollak did not advise Rivers of his defenses; particularly, that his conviction required corroboration of the victim's statement and proof of her age; that Pollak promised Rivers that he would be confined in the regional center and instructed Rivers to respond negatively when the judge asked him about possible threats and promises that induced his guilty plea; that there was animosity between Pollak and Rivers, shown when Pollak implied to the judge that Rivers was lying; and that Pollak had a conflict of interest in

offering to perform counseling between Rivers and Janette, while she was a potential witness; (2) *insufficient factual basis* to support the guilty plea; (3) *involuntary guilty plea*; and (4) *abuse of discretion* by the trial judge in the imposition of sentence.

A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986).

"A defendant seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous." (Syllabus of the court.) *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

The evidentiary hearing provided in § 29-3001 is a vehicle for a confined defendant to meet his or her burden of proof, and "although an evidentiary hearing is not always necessary on an application for post conviction relief, 'such a hearing is usually advisable to avoid protracted litigation.' " *State v. Waterman*, 215 Neb. 768, 774, 340 N.W.2d 438, 442 (1983). "A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional." *State v. Paulson*, 211 Neb. 711, 714, 320 N.W.2d 115, 117 (1982).

Pursuant to a court order, argument was had October 10, 1986, on the sole issue of whether or not an evidentiary hearing should be provided; no evidence was presented. On October 20, 1986, the judge made written findings, including:

> [T]he defendant was ably represented by his counsel at the time of the entry of the plea and prior thereto; that he has failed to show the ineffectiveness of counsel either in the records or the presentence report or that the items complained of could not have been used to secure the review of an issue on direct appeal.

Thereafter, he denied both an evidentiary hearing and the motion for postconviction relief, citing *State v. Birge*, 223 Neb. 761, 763, 393 N.W.2d 713, 714-15 (1986):

> This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second,

> the attorney must conscientiously protect the client's interests. . . . Additionally, the defendant must show that in the absence of the attorney's error the result of the case would have been different.

Although we believe it made no difference in this case, the correct rule is that the defendant must show that *there is a reasonable probability* that but for counsel's error the result of the case would have been different. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

One general error is assigned for review: "The Court erred in not allowing Appellant to proceed with an evidentiary hearing in support of his Motion to Vacate." We review by referring to the summarized allegations in the motion.

Ineffective counsel: There is no merit to Rivers' claim that Pollak did not explain his possible defenses. The record shows the victim had been living in his household for more than 10 years; Rivers had admitted to investigating officers that the victim was 15 years old; his plea of guilty was an admission; corroboration was clearly available and known to Rivers in the testimony of Janette, to whom Marjie promptly described the assault; the presence of like berry stains on the person of Rivers and the victim; Rivers led the officers to the assault scene; the positive laboratory report finding semen in the victim's anal cavity; and, finally, this record:

> THE COURT: Did your attorney fully explain the charges in the Information to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you discuss all available defenses that you might have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you withhold anything from him?
>
> THE DEFENDANT: Not that I know of.
>
> THE COURT: Well, you give him all the information that you have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are there any defenses that you think you might have that you haven't talked over with him?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Are you satisfied with the job that your

attorney has done for you?

THE DEFENDANT: Yes.

THE COURT: Do you feel he's competent?

THE DEFENDANT: Yes.

The record shows a searching court inquiry, *State v. Busse*, 186 Neb. 99, 181 N.W.2d 124 (1970), confirming that there were no promises or inducements made to Rivers:

> THE COURT: Has anyone connected with law enforcement or anyone else made any threat, direct or indirect, used any force or held out any promises to get you to waive or not have any of these rights that we've been discussing?
>
> THE DEFENDANT: No.
>
> THE COURT: You say they have not?
>
> THE DEFENDANT: They haven't.
>
> THE COURT: And are you waiving these rights that we've been discussing freely and voluntarily then?
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: Are you pleading guilty then solely and only because of the fact that you did in fact do the things which are charged in the Information?
>
> THE DEFENDANT: Yes.

The claim of animosity between Rivers and Pollak refers to the following exchanges during sentencing:

> THE COURT: Is there anything that your attorney didn't bring out that you would like to relate to the Court before sentence is imposed here, Robert?
>
> THE DEFENDANT: Just that I know I'm charged in Lancaster County, but those charges are not good.
>
> THE COURT: You're not aware of what they are, you say? Have you been arraigned up there?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you aware of what they are?
>
> MR. POLLAK: He's aware of what they are. He's denying the truth.
>
> THE DEFENDANT: I've been honest with everything that has happened but these are not honest charges over there.

Included in the presentence investigation report is a letter from the probation officer to Judge Case: "A warrant was issued for the above defendant on July 13, 1984 through the Lancaster County Court. . . . Mr. Rivers is accused of sexually assaulting a child. This event occurred sometime between May 1, 1984 and May 31, 1984."

Rivers initiated this line of inquiry apparently to advise the judge that the charges were unfounded. The judge's inquiry was limited to whether Rivers was aware that the charges were pending. Pollak's statement that Rivers was aware of the charges but that Rivers claimed they were not true was both responsible and proper under those circumstances.

Rivers claims that Pollak had a conflict since he offered to act as a counselor to reunite Rivers and his former wife, Janette, a potential witness against Rivers. The presentence report shows numerous letters between Rivers and Janette, all showing mutual continued love and affection, and that they attended counseling services together with no direct reference to participation by Pollak. The report does contain a letter from Pollak to the probation officer, enclosing a letter from Janette dated June 13, 1984, requesting leniency in sentencing, where Pollak says in his cover letter: "It appears from the letter that they are considering re-uniting and down the road bringing the family all back together. I hope you can take this into account in your pre-sentence investigation." There is no showing of either a conflict of interest or detriment to Rivers. See *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986).

There was no error in the findings of the trial judge and the order denying Rivers' claims of ineffective counsel.

Insufficient factual basis, involuntary guilty plea (*State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985)), and *abuse of discretion in sentencing*: These remaining claimed errors could have been raised on direct appeal; however, in view of the absence of an evidentiary hearing, we briefly address them.

The record abounds in factual bases, as shown by the presentence report, the statement of the county attorney made in open court, and Rivers' voluntary guilty plea. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985).

The claimed involuntary plea resulting from the promises

and inducements was heretofore discussed and shown to be unfounded.

Defendant's guilty plea was affirmatively shown to have been understandingly and voluntarily made, with an intelligent choice of alternative choices open to him. *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

The claimed abuse of discretion relates to sentencing, when the judge stated that he considered the information that there was an outstanding warrant for the arrest of Rivers from Lancaster County on a charge of sexual assault on a child. A sentencing judge has wide discretion in sentencing to consider presentence reports, police reports, affidavits, arrest records, personal observations, and other relevant information. See *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). There was no abuse of discretion shown.

From a review of the motion, files, and records, they affirmatively show that Rivers was not entitled to an evidentiary hearing, and there was no error in dismissing the amended motion.

AFFIRMED.

DANIEL T. MEIS, APPELLANT, MARK PROSSER ET AL., APPELLEES, V. GARY GRAMMER ET AL., APPELLEES.

411 N.W.2d 355

Filed August 28, 1987. No. 87-016.

1. **Appeal and Error.** A generalized and vague assignment of error that does not advise the Nebraska Supreme Court of the issue submitted for decision will not be considered.
2. _____. Consideration of an appeal to the Nebraska Supreme Court is limited to the errors assigned and discussed.
3. **Constitutional Law: Prisoners.** Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
4. _____: _____. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.

5. _____: _____. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
6. _____: _____. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
7. _____: _____. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
8. **Constitutional Law: Equal Protection.** The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Daniel T. Meis, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellees Grammer et al.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff Daniel T. Meis appeals from a declaration by the district court that certain provisions of the challenged portion of a Department of Correctional Services operational memorandum relating to the disbursement of trust funds belonging to inmates at the penitentiary are valid. Meis assigns as error the district court's (1) determination that Neb. Rev. Stat. § 83-183(3) (Reissue 1981) mandates restrictions on the use of inmate wages, (2) "den[ial of] the relief requested," (3) failure to set a time within which the defendants, Warden Gary E. Grammer and various other named and unnamed employees of the penitentiary, are to correct the deficiencies in the portion of the operational memorandum declared to be impermissibly vague and not to be enforced, and (4) failure to find the entire

challenged portion of the operational memorandum to be in violation of Neb. Const. art. I, §§ 1, 15, 16, 25, and 26, and the 14th amendment to the U.S. Constitution. We affirm.

Meis and eight other inmates brought this suit on their own behalf and purportedly on behalf of all other inmates at the penitentiary. However, Meis appealed to this court only in his individual capacity. Thus, we are not concerned with any class action issues which might otherwise have been present. Moreover, as Meis is the sole appellant, we do not concern ourselves with those parts of the record which relate to the claims of the other named plaintiffs.

As part of the Department of Correctional Services, the penitentiary maintains a single trust fund in which all inmate money, from whatever sources, is deposited, disbursed, and accounted for. On December 6, 1979, the penitentiary administration adopted an "official," later to become known as an "operational," memorandum, No. 113.2.112, to provide "a documented accounting for the funds of offenders." The memorandum underwent a number of revisions, and as of October 7, 1985, the date of the most recent amendment, its stated purpose is to "set forth a system for the accounting and handling of funds to be credited to Penitentiary inmates." It states in relevant part:

> As provided by Statute and Agency regulations, inmates may withdraw funds to assist with family support, make purchases in the Canteen and from approved vendors, or for deposit in interest bearing accounts in designated financial institutions. . . .
>
> For the purpose of this Memorandum, "FAMILY" is defined as parent, brother, sister, son, daughter, or spouse. Any exception to this stated list must have the approval of the Warden.

Prior to the October 7, 1985, amendment, the memorandum did not define family and made no provisions for exceptions to the "stated list."

The penitentiary administrators testified that the operational memorandum was necessary for the "safety, security, and good order of the institution," in that it provides a means of controlling the flow of inmate funds and thereby helps control

illegal activities such as gambling, purchasing drugs, and the applying of pressure by one inmate against another. The administrators admitted, however, that although policies as to the transfer of property from one inmate to another exist, it would be possible for an inmate to use canteen purchases as a means of paying off another inmate. An inmate could also deposit funds in an outside financial institution and deal with those funds without being subjected to the restrictions imposed by the memorandum.

Meis testified that on or about October 12, 1985, he requested that $5 be disbursed from his trust funds to pay a debt to a friend and that the request was denied by the penitentiary administration. Although there exists within the Department of Correctional Services an appeal procedure from the denial of disbursements, Meis did not avail himself of it. Defendants, however, raised no issue at trial in this regard. At the time of his request, Meis had approximately $135 in the fund. He had earned approximately $72 of the total while at the penitentiary; the balance came from sources outside the penitentiary through gifts or the payment of money owed him. Meis also testified he had successfully sent $4 to his friend on a prior occasion, but it is not clear when, as he had at one time alleged he had been prevented from using his money as he wished on August 27, 1985. Meis offered no evidence which documents the existence of the debt or which explains why or when it came into existence.

The district court concluded that the challenged portion of the operational memorandum was valid except for the single "sentence which reads 'Any exception to this stated list must have the approval of the Warden.' " The court found that provision to be vague and to therefore deprive the plaintiffs of due process, and thus enjoined the warden

> (a) from granting any exceptions which allow disbursements from the Inmate Trust Fund for family support or assistance to any persons other than those specifically included within the definition of "family", i.e., a parent, brother, sister, son, daughter, or spouse; and (b) from granting any exceptions to other portions of Operational Memorandum 113.2.112 dated October 7,

1985.

The court held the remainder of the challenged portion of the memorandum to be valid and enforceable and, accordingly, denied Meis' request that enforcement of the remainder be enjoined as well.

Meis' first assignment claims the district court's finding that § 83-183(3) "mandates certain restrictions on the use of wages earned by the inmates and money which is in the Inmate Trust Fund" is erroneous. No claim is made that § 83-183(3) is itself unconstitutional or that the challenged portion of the memorandum does not comply with the requirements of § 83-183(3); the only claim in connection with this assignment of error is that § 83-183(3) imposes no limitation on the use of inmate funds.

Section 83-183(1) provides for the employment of inmates in the "[Department of Correctional Services] facilities, for state use and for other purposes authorized by law." Section 83-183(3) states:

> Except as provided in section 83-183.01, wage payments to a person committed to the department shall be set aside by the chief executive officer of the facility in a separate fund. The fund shall enable the offender to contribute to the support of his dependents, if any, to make necessary purchases from the commissary, and to set aside sums to be paid to him at the time of his release from the facility.

Neb. Rev. Stat. § 83-183.01 (Cum. Supp. 1986) concerns itself with the treatment of wages earned by inmates paid "at least minimum wage." The evidence does not suggest that Meis earned at least minimum wage; thus, § 83-183.01 has no application. The language of § 83-183(3) does indeed undertake to limit the use of inmate wages to the support of dependents (not "family"), purchases from the commissary, and savings to be paid to the inmate upon release from the penitentiary. The district court's finding that § 83-183(3) mandates certain restrictions on the use of inmate wages is therefore patently correct.

The second assignment merely laments the denial of the relief sought. Such a purported assignment is so generalized and vague that it does not advise us of the issue submitted for

decision; thus, it is not considered. *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982).

Meis next complains of the district court's failure to set a time limit within which the defendants are to provide standards for determining the circumstances under which exceptions to the family limitation are to be made. However, he presents no legal argument in connection with this assignment, and, as consideration of an appeal to this court is limited to the errors assigned and discussed, we do not address the matter. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

However, since we do not know that any mechanism to provide for exceptions to the family limitation will be adopted, nor what such a mechanism, if adopted, will be, we base our analysis of the fourth and last assignment of error, that the district court erred in not finding the challenged portion of the memorandum violative of designated portions of the Constitutions of the United States and Nebraska, on the existence of only those provisions of the challenged portion of the memorandum found valid and enforceable by the trial court.

Meis first argues that said remainder of the challenged portion of the memorandum deprives him of a variety of rights guaranteed by the Constitution of this state. Specifically, he cites to that portion of Neb. Const. art. I, § 15, which states: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate"; to § 16, which states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed"; to that portion of § 25 which states: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment, or descent of property"; and to § 26, which states: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people."

In considering this phase of Meis' argument, we take instruction from the U.S. Supreme Court's consideration of

prisoners' rights under the federal Constitution.

Accordingly, we recognize that prisons "are not beyond the reach of the Constitution" and that prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). However, simply because prison inmates retain certain constitutional rights does not mean that those rights are not subject to restrictions and limitations. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights. *Whitley v. Albers,* 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986); *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). As the U.S. Supreme Court emphasized in *Bell*:

> "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." [Citations omitted.] Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. [Citations omitted.]

441 U.S. at 546-47.

Moreover, as the U.S. Supreme Court has recognized, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform; the problems are complex, intractable, and not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking, *Cleavinger v. Saxner,* 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985), requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). In the absence of substantial evidence that prison officials have exaggerated their response to

their concerns for internal security of the institution, courts should generally defer to their expert judgment. *Block v. Rutherford*, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Hudson v. Palmer, supra.*

Turner v. Safley held a regulation limiting correspondence between inmates at different institutions was reasonably related to valid corrections goals, but that a regulation preventing an inmate from marrying another inmate or civilian unless the prison superintendent determined there were compelling reasons was not. In making those determinations the *Turner* Court noted that several factors were relevant in determining the reasonableness of the regulations in question. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.

Those considerations lead us to conclude that, as applied to Meis, there is a valid, rational connection between the remainder of the challenged portion of the memorandum and the internal security of the penitentiary. There is no evidence as to when the debt on which Meis wished to make payment was incurred or the creditor's relationship, if any, to the prison's other inmates. So far as the record shows, the payment might be for an illegal debt incurred while the creditor was Meis' fellow inmate or might be tribute exacted from Meis for and on behalf of another present inmate. Under the circumstances, it cannot be said application of the remainder of the challenged portion of the memorandum to Meis impermissibly deprives him of the Nebraska constitutional rights he has enumerated. The fact the procedure for controlling illegal and security-threatening activities by the inmates may not be perfect does not mean that it must be abandoned and management of the penitentiary turned over to the prisoners.

Finally, Meis argues that he has been denied the equal protection guaranteed him by the "First and Twenty Fifth

Sections of the Nebraska Bill of Rights, and the Fourteenth Amendment to the United States Constitution" (Brief for Appellant at 17) because inmate accounts within the penitentiary are treated differently than inmate accounts at outside financial institutions.

Neb. Const. art. I, § 1, provides: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Neb. Const. art. I, § 25, provides: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law." The relevant portion of the 14th amendment to the U. S. Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions. See, *Grosvenor v. Grosvenor*, 206 Neb. 395, 293 N.W.2d 96 (1980); *Hartford Co. v. Harrison*, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937). The difficulty in attempting to apply that principle to this case is that no equal protection issue exists. There is absolutely no evidence that the penitentiary administration arbitrarily determined which inmate could place funds in outside financial institutions and which could not, or that Meis was himself prevented from placing his funds in an outside institution. In short, there has been no proof that the state has applied its powers in such a manner as to discriminate against Meis.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PATRICIA J. BECKER, RESPONDENT.

411 N.W.2d 361

Filed August 28, 1987. No. 87-545.

Original action. Judgment of disbarment.

BOSLAUGH, C.J., Pro Tem., HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an original action. On June 12, 1987, the Counsel for Discipline filed formal charges against respondent, Patricia J. Becker, alleging that she failed to pay the medical creditors of her client, Kevin A. Eglseder, in the aggregate amount of $383, and also that she made intentionally false and misleading statements to the Counsel for Discipline concerning the matter. The formal charges state that the actions of the respondent constitute a violation of Canon 1, DR 1-102, and Canon 7, DR 7-101, of the Code of Professional Responsibility.

On August 20, 1987, Counsel for Discipline filed a motion for judgment on the pleadings, the respondent having failed to file an answer to the formal charges within 20 days after service as required by Neb. Ct. R. of Discipline 10(H) (rev. 1986).

After a careful review of the record we find that there exists no issue of fact or law. Therefore, pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1986), it is the judgment of this court that the respondent, Patricia J. Becker, be, and hereby is, disbarred from the practice of law effective September 1, 1987.

JUDGMENT OF DISBARMENT.

BRUCE F. EVERTSON, APPELLANT, V. ROBERT D. CANNON ET AL., APPELLEES.

411 N.W.2d 612

Filed September 4, 1987. No. 85-679.

1. **Trusts: Property: Equity.** A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
2. **Joint Ventures: Words and Phrases.** A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
3. **Joint Ventures: Intent.** The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
4. **Joint Ventures.** A joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law.
5. _____. The existence of a joint venture is a question of fact.
6. _____. The existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, but it alone is not generally sufficient.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Donald J. Tedesco, and W. Perry Dray of Dray, Madison & Thomson, P.C., for appellant.

Steven C. Smith and Thomas D. Brower of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellees Robert D. Cannon, Elaine Cannon, and Marilyn Caldwell.

Gerald E. Matzke of Martin, Mattoon, Matzke & Mattoon, for appellees Dale Cannon, Eileen Evertson, and Arlene Meredith.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This case involves a dispute concerning several oil leases in

Morrill County, Nebraska. The plaintiff, Bruce F. Evertson, claims an interest in the leases on the theory that he was engaged in a joint venture with the principal defendant, Robert D. Cannon, who will be referred to as the defendant. The other defendants include various members of the Cannon family: his father, Dale Cannon; his wife, Elaine Cannon; two sisters, Eileen J. Evertson and Arlene C. Meredith; and his mother-in-law, Marilyn J. Caldwell. The defendant's sister, Eileen J. Evertson (Jeannie), was formerly married to the plaintiff.

The record shows that in 1981 or 1982, the defendant, who was engaged in the oil well service business with the plaintiff, decided that he wanted to acquire some oil production. The defendant and his father were acquainted with an oil well known as the "Exeter well" which was unusual because it had produced a large amount of oil over a period of years from only 2 feet of pay sand. The defendant's father had acquired the Matador unit, which was located just west of the Exeter well. The leases on the land to the north and east of the Exeter well were held by the Gulf Oil Co. The defendant acquired a farmout agreement from Gulf which would give him the right to drill wells on a 200-acre tract if he drilled a producing well in the tract.

A well known as the Willson-State No. 1 was the first well drilled under the farmout agreement, and it proved to be a producing well. The defendant acquired additional leases on land adjacent to the 200-acre tract, and additional wells were drilled.

The plaintiff commenced this action to impose a constructive trust on the leases obtained by the defendant from Gulf and on land adjacent to the 200-acre tract. The plaintiff contends the parties had an agreement to pursue the entire project as joint venturers. The defendant contends the plaintiff's interest in the project was limited to an interest in the first well.

The trial court found generally in favor of the defendant and dismissed the petition. The court found specifically that the plaintiff had failed to prove his case; that the statute of frauds was applicable to the transaction; that there was no written contract between the parties and no fiduciary relationship between them; and that there was no proof of a joint venture.

The court found that the defendant was not a constructive trustee of the oil and gas leases and that the evidence presented by the plaintiff was not clear and convincing.

The plaintiff has set forth seven assignments of error, but has failed to brief the assignments of error concerning the release of approximately $600,000 prior to trial and the contention that the trial court erred in overruling the motion for a new trial. Accordingly, those assignments of error will not be discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987). The remaining assignments of error, in essence, contend the trial court erred in finding that there was no agreement between the parties to acquire acreage for exploration and development, that the statute of frauds applied to any agreement between the parties, and that there was no joint venture with respect to the Gulf farmout acreage and the adjacent additional acreage.

The plaintiff contends that since the trial court found there was a fiduciary relationship with regard to the first well, the court should have found such a relationship existed as to the other leases. This contention is without merit. The trial court specifically stated, when overruling the motion for new trial, "[O]nce Mr. Cannon gave Mr. Evertson the 30% interest in the first well, he became a fiduciary with respect to the *operation* of that first well. . . . [O]nce that was given, there was a joint venture to that extent in the first well . . . ." (Emphasis supplied.)

The plaintiff next contends the evidence was sufficient to support a finding that a fiduciary relationship existed as to all of the leases because the parties were joint venturers. The plaintiff argues there was a community of interest and common purpose between the parties and that his claim is supported by the evidence, which included evidence of custom in the industry. The plaintiff further argues that the parties had an oral agreement concerning the venture, that the actions of the parties support a finding that such an agreement existed, that such informal agreements are common in the industry, and that it is an uncommon practice to split a 40-acre segment out of a larger acreage, as the defendant did in this case.

The following is a summary of the evidence presented at the

trial.

The plaintiff testified that he hired the defendant to work for Evertson Well Service, Inc., in 1975. The two men had previously worked together for C & C Well Service, a firm owned by Dale Cannon. The defendant became a part owner of Evertson Well Service, Wyoming, in 1976, and ran the day-to-day operations of that business. The two men later formed Evertson Oil and Gas Well Service and owned equal shares in that company. The two men personally guaranteed a line of credit to enable the corporation to purchase needed equipment, and bought out the other stockholders in 1979. The defendant supervised the rigs in southwest Wyoming, and the plaintiff supervised the rigs in the area of the D-J basin in Nebraska. The two men had known each other for about 20 years.

The plaintiff described their relationship as being "[v]ery, very close" and stated that he trusted the defendant, had confidence in his abilities, and relied on him in their business operations through 1982. The plaintiff testified both men had interests in other businesses and were not jointly interested in all of each other's affairs.

The plaintiff testified that a "working interest owner" pays for his interest in a leasehold, pays his share of the monthly bills, and receives some percentage of the oil and gas production. He testified that a royalty interest is an overriding interest in production which does not require the payment of costs.

The plaintiff testified that the two men had entered into oral agreements in the past as a normal course of conduct and that it was a usual and customary practice in the industry to send working interest owners bills which indicated the proportionate share of expenses.

The plaintiff testified that from June 1982 to May 1983, the personal relationship between the two men was "the same as it had always been. We were partners and very close." He testified that they began to discuss offsetting the Exeter well in the summer of 1982. It had been his understanding they would undertake the project as equal partners. According to the plaintiff, the defendant subsequently discussed the project with a geologist, Alexander Boardman, who advised them as to the

best spot on which to drill or offset the Exeter well and that Gulf held the leases on that acreage. The defendant then determined Gulf did control the land, and eventually contacted Gulf and obtained an offer for a farmout agreement. A farmout agreement is one in which the owner or lessor who does not wish to drill conditions an economic interest in the lease upon the drilling of a producing well on the property by another party. The deal was confirmed by Gulf in November 1982, and the written farmout agreement was received by the defendant in December of that year.

The farmout agreement provided that if a producing well was drilled on the property, Gulf would retain an 8-percent override on the lease, and the defendant would have the right to drill on the 200 additional acres. After the plaintiff was informed Gulf had approved the farmout agreement, he contacted several drilling contractors to bid on the well and sent one of his employees to examine the site. He then contacted a dirt contractor, and a drill site was chosen. The drilling contract identifies the parties as "Evertson & Cannon" and "Banner Drilling Company." A notice of intent to drill was filed with the state November 30, 1982. The operator of the well was listed as Evertson Well Service, Inc. The well was identified as Willson-State No. 1. Drilling commenced December 3, 1982, and proceeded normally. The two men discussed which pipe casing would be appropriate, and the plaintiff ordered it. The plaintiff testified that Dale Cannon was never on the site and did not make decisions regarding running the pipe.

At some point the geologist gave the two men his recommendations concerning perforating the well and the advisability of obtaining additional acreage. The plaintiff asked a business acquaintance, Ebb Lueck, to contact a landman, and Lueck then contacted Tommy Lee. Lee recommended that Lee obtain a "top lease" on certain property and later assign it to the parties. The plaintiff testified they agreed to follow Lee's recommendations. The parties then determined the proper place to perforate the well, without any help from Dale Cannon, and the well was completed. The parties determined what equipment was necessary and made all of the arrangements for the well, again, without the assistance

of Dale Cannon.

In early December 1982, when the plaintiff learned the defendant had not actually received the farmout agreement itself, but had only a letter of intent from Gulf, he contacted his attorney regarding the matter. The drilling expenses were later paid by the defendant's and plaintiff's accountant, in late December 1982. At some point the defendant decided he wanted to be the operator of the well and began to process all of the bills himself. The bills from the well, which included invoices made out to Dale Cannon, were received in evidence.

The plaintiff testified he received an invoice which disclosed his working interest in the well in early January 1983, which he paid by a check dated December 28, 1982. He testified that he was not aware that his interest was listed as 30 percent at that time, but assumed it was approximately 48 percent until he received his second bill in January 1983. The plaintiff stated he confronted the defendant about the discrepancy and was told the latter had decided to let his dad in on the deal. The plaintiff testified he told the defendant to "straighten it out." Subsequent invoices continued to show the plaintiff's interest as 30 percent.

The plaintiff testified that he realized there was a problem with the farmout acreage in June 1983, when his attorney notified him that the defendant had assigned an interest to him in only the first well. The plaintiff learned the defendant had top-leased additional acreage in his own name during that same time. The plaintiff believed this was contrary to the parties' earlier agreement with Tommy Lee. Further, the plaintiff was not offered a chance to participate in a well subsequently drilled on the Gulf farmout acreage and stated that his offer to pay his share of the drilling costs of that well was refused. Also, the plaintiff was refused participation in wells drilled on acreage subsequently acquired by the defendant.

The plaintiff testified his offer to pay a proportionate share of expenses was contained in a letter from his attorney to the defendant. The letter concerned the East Matador land, Gulf farmout land, and adjoining acreage. The plaintiff testified that in the letter he had asked for a 30 percent share because he was still hoping the matter could be settled without resort to

litigation, but when litigation was the only possible avenue he decided to sue on the terms of the original deal.

The plaintiff testified he was active in the search for and negotiations with the ultimate purchaser of the oil and that Dale Cannon had not been involved in such negotiations. The plaintiff further testified that immediately prior to his divorce settlement his relationship with the defendant changed drastically. He stated there was also a problem when the defendant quit working for him during the last week in February 1983. The plaintiff testified that Arlene Meredith, Elaine Cannon, Marilyn Caldwell, and his ex-wife, Eileen Evertson, were not working interest participants in the first well.

Exhibit 9 is an assignment by the defendant and his wife to the plaintiff, Dale Cannon, and Melvin Brunet of interests in the first well. The plaintiff testified that he had contacted the state to obtain a new field designation for the whole Gulf farmout and additional acreage of the East Matador unit, which was granted. The letter from the state was directed to the plaintiff and the defendant. The plaintiff later testified that only the first well had been drilled when the state granted the designation, and the limits of the new field were not designated.

On cross-examination the plaintiff testified that his offer to pay the expenses on the additional wells was contained in the following language of the letter from his attorney to the defendant:

> 1. Mr. Evertson considers himself to be a partner (30% working interest owner) in the entire lease described herein, and any adjoining acreage acquired by you or in your behalf;
>
> 2. In the event that any additional drilling or exploration is performed on any of the leased acreage, or adjoining acreage, by you or on your behalf, Mr. Evertson will be a partner as stated above (whether it be a producing well or a dry hole) . . . .

According to the plaintiff, the offer to pay was implied by the use of the term "30% working interest." The plaintiff testified that he fired the defendant only once, in June 1983. He also testified that both men had occasionally used company

facilities to make private deals. The plaintiff testified there were some problems between him and the defendant when his divorce was filed on January 12, 1982. He then testified the Gulf farmout lease was requested in the summer of 1982, the leases on Sections 10 and 15 were acquired in June 1983, and the Juelfs lease was acquired in September 1983. The plaintiff also testified that the allegation in his pleadings that at the time all of the leases were acquired there was a relationship of trust and loyalty was not true, at least as to the Juelfs lease.

The plaintiff also testified that Evertson Well Service was listed as the operator of the first well because it had the bond required by Nebraska law, and, at that time, the defendant did not. The plaintiff stated that later that year, when the defendant obtained a bond, he then became the operator.

When asked whether, if the defendant had never offered him an interest in the first well, he would have felt "gypped, robbed, or [that the defendant had] violated his trust," the plaintiff answered, "No."

The plaintiff admitted that in a deposition taken prior to the divorce settlement he made a statement that he was supposed to have a 30-percent interest in the first well. The plaintiff also admitted that he had assigned a 15-percent interest in the first well to his former wife as a part of the property settlement and had represented that amount as half of his interest. Plaintiff also stated he had signed a division order from the Permian Corporation which stated that he owned a 15-percent working interest. He later testified that at the time his deposition was taken in his divorce case, June 9, 1983,

> it was pretty evident on that day that Rob had been working with Jeannie for quite some time.
>
> Q. What do you mean by working with Jeannie?
>
> A. Well, I think Jeannie stated in there that I tried to sell the companies out from under Rob, or something to that effect, and that just wasn't true.
>
> Q. Were you convinced at that time, on June 9, 1983, at the time of the taking of your deposition, that Rob was working against you?
>
> A. It sure looked like it to me.

Under the terms of the property settlement the corporations

were divided between the two men and Mrs. Evertson.

On redirect plaintiff was asked about his statement that had the defendant not offered him an interest in the first well, plaintiff would not have felt gypped or cheated. The plaintiff explained that statement by stating his feelings would depend upon the stage of the proceedings, in that once he paid his portion of the expenses on a drill-to-earn farmout arrangement, he would feel cheated if denied the opportunity to participate in the whole farmout.

The plaintiff then called the defendant, who testified the two men had had an extremely close relationship for many years. The defendant testified the first well was drilled on the initial 40-acre tract leased from Gulf, and, because that well was successful, 200 additional acres were earned. A second well was drilled on the additional (or farmout) acreage, known as Cannon-State No. 1, which became a producer. The defendant testified he was unaware plaintiff claimed an interest in the well until he received a letter from plaintiff's attorney. The defendant testified he assigned interests in that well to his wife, Elaine, Dale Cannon, Arlene Meredith, Jeannie Evertson, and Melvin Brunet. The defendant testified he believed the two men were partners on the first well only and that he had never stated he was giving the plaintiff an interest in the entire Gulf farmout.

The plaintiff next called the geologist used on the project, Alexander Boardman. Boardman testified his first business relationship with the two men occurred during the drilling of the first well. Boardman testified the defendant initially contacted him about the project in about July 1982. He then investigated the possibilities and advised the defendant where to drill. Boardman testified he had not spoken with plaintiff during this time.

Boardman testified he later told both men that to maximize their position the best acreage to obtain would be the southeast quarter of Section 9, the west half of Section 10 or any part of 10, and the northwest half of Section 15. His next proposed location was the northeast quarter of the northeast quarter of Section 16. Boardman defined an "area of mutual interest" as an area where two or more individuals have a mutual interest to acquire assets, jointly, as quickly as possible. Boardman

testified that, in his opinion, the acreage he recommended the two men acquire was an area of mutual interest. Boardman testified he had then asked the two men for an overriding interest because he had recommended the additional acreage and asked for the royalty in the new leases rather than the Gulf farmout acres, and the two men agreed. Boardman testified he was receiving an override royalty on the Coop lease at the time of trial. Boardman testified that he gave all of his information concerning the well and recommendations concerning the acquisition of additional acres to both men. Boardman believed, based on his experience in the industry, that the two men were joint operators.

Boardman testified he was unaware of any problem between the two men until the fall of 1983, when Dale Cannon contacted him about drilling on Section 16 and informed him the well would not be called the Willson-State No. 2. Boardman testified he subsequently set the Juelfs No. 2 well for Dale Cannon on Section 15, State No. 1 on the northeast quarter of the northeast quarter of Section 16, and Coop No. 1 on Section 10.

Boardman testified there are customs and practices in the industry concerning informal and oral agreements, that verbal agreements are very often used because of time constraints, and that it was customary in situations involving more than one person for one to act as the operator, do the correspondence and negotiations, and later assign interests when the well produces. Boardman testified there are customs and normal practices in the industry concerning the participation of the working interest owner in the first well and his subsequent participation in wells located within the area of mutual interest. He testified it was customary, in this area, depending on one's interest in the first well, to participate in all subsequent wells on that lease or farmout plus any additional acreage acquired on adjoining lands. Boardman also testified such a practice was more economical because it limits competition and therefore "the partnership that goes with the first well, continues throughout, assuming each partner pays their own way and does not renege."

On cross-examination Boardman testified that an

individual's entitlement to an interest in subsequent wells after the first well is drilled depends upon what interests the parties agreed to share, either in writing or orally, when the first well was drilled. Boardman did not know what agreement the parties had concerning the interests in the first well.

Boardman testified that, all things considered, he would pay considerably more for a working interest in the Cannon-State well than for such an interest in the Willson-State.

The plaintiff then called Daniel Matthews, a former accountant of Evertson Well Service. Matthews testified he did the plaintiff's personal books and tax returns, and tax returns for defendant for 1 year. He was supervised by both men but worked more closely for the plaintiff. He considered himself a close friend of the defendant's until February or March 1983, when he was told defendant considered him "crooked." Matthews testified that from 1977 through 1983 the plaintiff and defendant were like brothers. Matthews testified he had listened to the property settlement discussions wherein it was discussed that the two men could no longer work together and have a working relationship and, therefore, they wanted to split up the corporations. He stated the Gulf farmout agreement and the first well were discussed at both meetings. Matthews also testified he had once heard defendant tell plaintiff that he was planning to do something on the Willson Ranches and that plaintiff indicated he would be interested.

Matthews further testified that he had asked the defendant whether a drilling permit had been filed on the first well, and when defendant indicated he had not done so, the latter asked if Matthews could do so. Matthews then asked the defendant whether he had an operator's bond, and when the latter said no, Matthews told him Evertson Well Service did have a bond and he could fill out the drill permit with Evertson Well Service as the operator. Matthews testified he had spoken with Tommy Lee about the acreage both men wanted to be checked. Matthews testified Tommy Lee returned the next evening and told the two men about the owners on the various sections. Matthews testified that he and the defendant had reviewed the bills from the wells and summarized them for the working owners on December 28, 1982. Matthews testified that when

plaintiff paid the first bill representing his interest in the first well, the invoice which set out plaintiff's working interest percentage was not submitted to plaintiff along with the check. Matthews testified that at that time he did not know what percentages the two men had agreed upon. Matthews testified he became aware of the problem in January or February of 1983 after plaintiff saw one of the invoices and called Matthews to ask him about it.

Matthews testified he was unaware that Dale Cannon was involved in the first well until December 28, 1982, when the defendant told him the distribution of interests. Matthews testified the two men had previously drilled wells together without first entering into written agreements.

The next witness was Stanley Pierson, an earth-moving contractor who worked on the first well. Pierson had been contacted by plaintiff. On cross-examination, Pierson testified he had discussed the well with Dale Cannon at some time during the drilling of the first well and dealt with Dale Cannon on the wells subsequently drilled.

Plaintiff's next witness was Ebb Lueck, who testified he had a conversation with the two men wherein the two were discussing the possibility of acquiring more acreage and had asked Lueck to contact his landman for them. Lueck testified it was customary in the industry for parties to enter into informal and oral agreements, and written agreements are not entered into until the parties have committed to the deal. Lueck testified that in situations where people invest in a first well, they generally own their proportionate share of additional acreage.

On cross-examination Lueck testified that when giving his opinions as to the customs of the industry he was relying on his experiences, which involved mostly promoted deals. A promoted deal is a deal in which a promoter finds a drilling prospect and all of the people who buy into the deal pay their share of the costs. Lueck testified he did not have any understanding of the terms of the deal between the parties in this case. He also testified that, in a promoted deal, the initial well is drilled with the participants' money, and they would have agreed in advance as to the scope of the agreement as to the mutual area of interest, meaning they would have agreed in

advance to participate on subsequent wells. Prior to drilling, in deals he organizes, Lueck puts the agreement and operating agreements in writing, and such agreements contain the right to participate in additional wells.

Tommy Lee then testified for the plaintiff. Lee testified he had met with Dan Matthews on December 7, 1982, and was told to check out Sections 9, 10, 15, and 16, in Morrill County. He returned to Evertson Well Service later that evening and gave the information he had obtained to both men. When the three men met again the next night, Lee gave specific suggestions concerning the acquisition of the leases. It was his understanding that the three then agreed upon a plan of action. Lee testified the plans were never realized, he later billed Evertson Well Service for his services, and he did not receive his compensation until sometime within 6 months prior to trial. It was his impression the two men were partners, although he did not know the specifics of their relationship. Lee testified he had often taken leases in his own name and later assigned them pursuant to oral agreements. He also testified that a person involved in the first venture, who spent his money on the front end, should earn the same opportunity in subsequent lands involved. He testified that such a practice was common in the industry and would apply to a farmout situation, in that once the initial well was compieted, the normal procedure would be to go back to the people involved in the first well.

The plaintiff's next witness was Paul Roberts, a petroleum engineer employed by the Nebraska Oil and Gas Conservation Commission. Roberts testified he was aware of the customs and acceptable practices in the industry in the area of western Nebraska and eastern Wyoming. He testified that in a situation where working owners participate in the first well in the area, those same people normally participate in subsequent wells. On redirect examination, Roberts testified that if he was a working interest owner in the first well on a 200-acre farmout and was not assigned or offered a chance to participate in other wells, he would feel he had been treated unfairly. On recross-examination Roberts testified his entitlement to the additional acres would depend upon the agreements between the participants.

The next witness called was Craig Camozzi, who testified that he had asked the two men about the structure of their deal and what kind of acreage could be earned by drilling. The defendant answered that "they got a 200 acre farmout from Gulf Oil." Camozzi presumed the word "they" referred to both men. Both men indicated there could be additional drilling north of the well, as an offset. Camozzi testified that, on one occasion, both men said they were partners in the well, and that people who participate in the first well in a project usually participate in subsequent wells, but such participation is normally subject to an agreement between the parties.

The next witness was Simmons Cook, who testified the defendant had asked him to set up a meeting for him with Frank Baumgartner. Cook later attended the meeting, along with the two men and Tommy Lee. Cook testified he had previously been part of a deal with Dale Cannon wherein one producing well was drilled which earned additional acres. No additional wells had been drilled, but Cook received an assignment of interests in the entire acreage.

The plaintiff next called Leon Birdwell, who was then employed as a superintendent for Evertson Well Service. Birdwell examined the terrain upon which the first well was located, prior to its drilling. On cross-examination Birdwell testified Dale Cannon's equipment was used to remove snow at the first well.

Randy Nielsen, the plaintiff's former attorney, was then called by plaintiff, and the parties stipulated he was authorized to testify and that any confidential privilege was waived. Nielsen had been asked by both men to review a letter from Gulf concerning the farmout and advise them of its legal ramifications. Nielsen advised the defendant at that time that he was representing the plaintiff in the divorce proceeding between the plaintiff and the defendant's sister. The defendant had stated there was no problem and that he wanted to stay out of the divorce. There was also a discussion about and a request that Nielsen do some title work for the two men. Nielsen testified that Dale Cannon brought some papers from Gulf to his office for additional work. Nielsen subsequently prepared an assignment and forwarded it to the defendant, and then a

second copy mailed on April 8, 1983. Nielsen received the second copy of the assignment back approximately 3 months later, after several delays because the defendant's wife had been out of town. He thought the original document might have been destroyed.

Nielsen became aware of a dispute between the parties when he received a letter concerning the assignment, which assigned only an interest in the original 40 acres, the first well, to the plaintiff. Nielsen subsequently prepared a letter addressed to Thomas Brower, the defendant's attorney, concerning the lease and operating agreement, stating both were unacceptable to the plaintiff.

The letter stated the operating agreement was unacceptable because it did not cover all of the land contained in the farmout lease. The letter was dated August 25, 1983. Brower responded to this letter by requesting Nielsen return the original signed copies of the operating agreement and a copy of any document evidencing an agreement between the parties.

On cross-examination Nielsen testified that no one had told him the entire 200-acre tract was part of the deal between the two men, but he had assumed that it was. He was unaware the plaintiff had claimed more than a 30-percent interest in the first well until the lawsuit was filed. Nielsen further testified that Dale Cannon had given him papers, including a note which indicated the various interest holders. The note was taken at some point by the plaintiff and was not produced at trial. Nielsen testified he filed the assignment as written by the defendant so that the plaintiff could receive his money.

The plaintiff then called Roland Champion as an expert witness. He had reviewed the depositions, talked with the plaintiff, and met with the plaintiff's counsel to review the case, and believed that he was familiar with it. Champion stated he understood the defendant's theory of the case, and was familiar with farmout agreements in general and with the area in question. He testified he had never seen an operator limit the interest of a working owner to the area of the first well. Champion testified such a right of participation could be inferred from ownership, and was practical, because it is viewed as a joint venture wherein everyone shares equally losses and

profits, and it prevents competition.

On cross-examination, Champion testified it was the present custom in the industry to reduce agreements to writing. He also testified that the scope of any venture, including the number of acres and wells, depends upon the agreement between the parties.

The next witness was Norman Adams, a consulting petroleum engineer, called as an expert witness. Adams had evaluated the East Matador and filed reserves upon the request of Lueck, who acted on instructions from the plaintiff. The growth reserves for the first well were 102,000 barrels. He also testified as to potential prices and drainage concerns.

Plaintiff then called Jerry Simmons, who testified that a "40 acre deal" was a situation where only 40 acres are involved in a farmout arrangement. He had never seen such an agreement in the D-J basin.

On cross-examination, Simmons testified that an area of mutual interest was generally determined by agreement of the parties, which, in his experience, was generally a written agreement. He testified that an individual's right to participate in wells drilled after the first well was dependent upon the agreement of the parties.

On redirect examination, Simmons stated that it was his practice to give participants who invest in the first well an opportunity to participate in all additional drilling on the same basis as the first one. Such a practice eliminates competition among the participants. He further testified that generally he first enters into an oral agreement in oil deals, which may not be committed to writing for some time.

On recross-examination, Simmons testified such oral agreements are generally reduced to writing before the well is drilled, and such agreements generally include any rights to participate in later wells. On redirect examination, Simmons testified it was not uncommon to drill on an oral agreement, particularly in yearend deals.

The plaintiff then called Dale Cannon, who testified that he acquired an interest in the first well in 1983, after the well was drilled, but he had an agreement to acquire that interest in 1982. He testified he was a working interest owner in the Cannon-

State No. 1 well, had acquired that interest in 1983, and had a working interest in the Coop No. 1 well, which had been acquired in 1984.

The plaintiff then rested.

The defendant moved for a directed verdict on the grounds the plaintiff had failed to prove, by clear and convincing evidence, that there was an agreement as alleged in the petition which had been violated by the defendants. The remaining defendants also moved for a directed verdict on the grounds the agreement involved an interest in real estate, and therefore had to be in writing to satisfy the statute of frauds and that the plaintiff had presented no evidence of any relationship between himself and these defendants upon which to base a constructive trust. The court took the motion under advisement and directed the defendants to proceed.

The defendants first called Dale Cannon, who testified he and the defendant had begun to discuss a joint drilling project in the spring of 1982. The two later investigated prospective drilling sites and decided to check out land titles on property adjacent to the Exeter well. Dale then recommended the defendant call Alex Boardman for advice. Dale testified the defendant handled all of the negotiations but kept him advised of his progress. Dale stated that he and the defendant discussed the Gulf deal together before deciding to take it. It was his understanding, at that point, that he, the defendant, and Melvin (Coonie) Brunet would be the only participants in the deal. Dale stated he was unaware plaintiff would have an interest in the well until shortly before a drilling rig had moved onto the site. At that time he understood the plaintiff would have only a 15-percent interest in the first well. Dale stated that although he was not involved in the day-to-day drilling activities of the first well because he was involved in drilling three other wells in Kansas, he had made arrangements for Powers Elevation to stake the well. Dale testified he and the defendant discussed the acidizing and fracing of the well, and he loaned the defendant a tank of crude oil for use in acidizing the well.

Dale testified that in January 1983 he advised his son not to assign any interests out and to make sure the oil purchasers sent

their payments before he paid any money out. He stated that at that time they also discussed the size of the acreages. He testified they agreed they should let other people in on 40-acre locations,

> because— We had discussed the possibility of this being a dry hole— And Rob said, "I'm going over right away and drill another one then and I'll try to find it; at least one more, maybe two."
>
> Evidently, he had told me that he had discussed this with Evertson; he told Evertson the same story, and Evertson said well, "That's kind of stupid. I wouldn't go drill two more dry holes." Rob said, "No, it's not stupid, to my way of thinking, because I know that it's there. It's just a matter of finding it."
>
> Well, that shows right there that anybody interested in that first well could have backed out on the next well or two and, therefore, you've got the lease tied up because they don't want to put their money in. So, you know, it's better to assign it, on this type of a deal, to 40 acres where we knew that we were going to drill at least two or three wells if the first one was dry.

Dale testified he would have invested in a second well if the first one had been dry. Dale testified that he and the defendant worked together on the second well. Dale paid for the drilling and completion of the well and was repaid by Arlene Meredith, the defendant, and Jeannie Evertson in exchange for interests in the well. Dale had previously paid the defendant for his interest in the first well.

Dale testified that he paid for the "wash-down" of Juelfs No. 1 and was later repaid by Eileen Evertson and the defendant. The next well was Juelfs No. 2, which was ultimately abandoned, and the same payment arrangements were made.

The next well drilled was the Coop No. 1 well, which was a producer. Similar payment arrangements were made on this well. On cross-examination Dale testified he had taken some action to increase the productivity of the Willson-State No. 1 well, after which production rose from about 32 barrels per day to 75 to 80 barrels per day.

Dale testified that he and the defendant did not have any written agreement concerning their interests in the first well. He believed Brunet knew it was a 40-acre deal and that Brunet had an interest in the first well and the Cannon-State No. 1 and Coop No. 1 wells. He also testified that he did not trust the plaintiff.

The defendant testified that the plaintiff had asked to participate in the Gulf deal just after the defendant had struck a deal with Gulf. The defendant testified he had told plaintiff at that time,

> it was just a one shot deal. You know, if it made a dry hole, I was going to step off and drill another one directly right by it. He said, "Well, he didn't have no problem with that because it was kind of stupid to drill two dry holes in the same place anyway."

The defendant testified that plaintiff clearly stated he wanted either 15 or 20 percent, because that was the figure needed for yearend tax purposes. The defendant did not tell the plaintiff they would be equal partners in the first well, and he told the plaintiff that his dad would be involved. The defendant testified the two men disagreed as to which drilling contractor to use, and defendant made the ultimate decision himself. The plaintiff lined up some contractors, while the defendant lined up others.

The defendant testified he decided upon the percentages to assign to the participants in December, and gave the plaintiff a greater interest than he had requested to repay him for past dealings and because the plaintiff's marriage seemed on firmer ground. At this time the defendant knew the first well was a good one. The defendant testified that after he was fired by the plaintiff for the first time on February 20, 1983, he decided not to offer the plaintiff interests in any wells subsequent to the first well.

Melvin Brunet testified that when he learned Gulf had given the defendant an offer which he planned to accept, Brunet told him he was still interested and would probably take a one thirty-sixth interest. He later discovered the defendant had let the plaintiff in on the deal, which surprised him. Brunet testified the defendant told him the defendant would have the

controlling interest in the well and operate it. Brunet said it was his understanding that the deal involved only the 40 acres upon which the first well was located, and everyone would be in on the same deal with regard to the first well. The parties later agreed that Brunet would have a 3.13-percent interest. Brunet testified he has working interests in the Cannon-State and Coop leases and obtained those interests prior to the drilling of the wells. The defendant had told him each well was a separate deal. Brunet testified he was offered an opportunity to participate on the first Juelfs well but declined to do so, and was not offered an opportunity to participate in the second Juelfs well. Brunet testified he received no correspondence concerning the first well, but received written correspondence concerning the subsequent wells prior to drilling.

Brunet testified that he did not believe, at any time, that he had any right or entitlement to an interest in acreage or well sites other than those offered to him by the defendant.

On cross-examination Brunet testified he had never discussed the agreement between the parties with plaintiff. In a deposition Brunet had stated that his interest was initially limited to the 40-acre tract.

Arlene Meredith testified she had worked for the defendant since 1980, first for Evertson Well Service, then for Cannon Oil Well Service. She testified her sister, plaintiff's former wife, had told her that the plaintiff had said the Gulf farmout deal was not his deal and had later stated he would take 10 to 15 percent of it. She testified the defendant told her that he had let the plaintiff in on the deal to repay him for letting the defendant in on deals in the past. He also told her plaintiff's participation was limited to the 40 acres.

Eileen Cannon, the defendant's mother, testified that the defendant had told her the plaintiff had a 15- to 20-percent interest in the first well only.

A constructive trust may be imposed where "one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property." *Ford v. Jordan*, 220 Neb. 492, 494, 370 N.W.2d 714, 716 (1985). In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of

those entitled to ownership. Such a suit is reviewed by this court de novo on the record, "giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite." *Id.*

A joint venture arises when

> "there [is] an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other."

Fangmeyer v. Reinwald, 200 Neb. 120, 131, 263 N.W.2d 428, 434 (1978), citing and quoting from *Soulek v. City of Omaha*, 140 Neb. 151, 299 N.W. 368 (1941).

> The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship; there must be something more than mere sharing of profits, some active participation in the enterprise, and some control of the subject matter thereof or property engaged therein. "Each member of a joint adventure has a dual status — that of principal for himself, and as an agent for the others."

Fangmeyer, supra at 131, 263 N.W.2d at 434.

In *Soulek* we stated a joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law. We also stated that the agreement need not be express, but may be implied, in whole or in part, from the apparent purposes and the acts and conduct of the parties. The relationship depends upon the legal intent of the parties as determined by examining the facts and circumstances of each case. The primary criterion is that the parties enter into an agreement, express or implied, as owners or principals in the endeavor. The arrangement must be for the parties' mutual benefit, "in the pursuit of which each has equal voice, control and authority, although performance may be entrusted to one. There must be a community of interest in the objects and

purposes of the enterprise, without which there can be no joint adventure." *Soulek, supra* at 156-57, 299 N.W. at 372.

The existence of a joint venture is a question of fact. *Rossbach v. Bilby*, 155 Neb. 575, 52 N.W.2d 747 (1952). Once a joint venture is created, each party has a right to expect the utmost good faith and square dealing in all matters which relate to the common interest, because the venturers stand in a fiduciary relationship to each other. *Alexander v. Turner*, 139 Neb. 364, 297 N.W. 589 (1941).

The U.S. Court of Appeals for the Eighth Circuit applied Nebraska law in *Kelley Inv. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 386 F.2d 595 (8th Cir. 1967), to determine whether a joint venture was created by an oral agreement. After summarizing Nebraska law, the court concluded that an oral agreement in which money contributed by one party was combined with the skill and knowledge of the other, in a common enterprise of speculating in the stock market for their mutual benefit, had created a joint venture. The parties had agreed to share profits and losses, and, although one party had been entrusted with performance, the court found there was mutuality of control. The latter finding was based on the party's admissions and the agreement that either party could liquidate the contracts.

This court addressed the issue of the existence of a joint venture in *Carey v. Humphries*, 171 Neb. 578, 107 N.W.2d 20 (1961). In *Carey*, we held:

> "The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff."

Id. at 596, 107 N.W.2d at 31.

In *Carey* the facts established that defendant Dan Reinfried had acted as a principal in the transaction, and not as an agent or representative of anyone else. Reinfried acted only on his own behalf in securing the leases and dry-hole money and in selling them to Robert Braden. To establish a joint venture the

proponent must show its existence by clear and convincing evidence. On those facts we held a joint venture was not created and Reinfried had not breached a fiduciary duty by entering into certain other leases without advising Braden, the person who had purchased the first leases.

The plaintiff argues there is a distinction between *Carey* and this case because in *Carey*, unlike here, the court found there was no venture. The plaintiff argues that *Carey* is also distinguishable because there, unlike here, the parties presented no evidence of custom in the industry.

This argument is unpersuasive. In *Carey* the court found there was no joint venture relationship because the transactions at issue were wholly separate and not subject to an agreement between the parties to act as joint venturers. The trial court made a similar finding in this case, that the transactions were separate and not subject to an agreement between the parties. The court specifically found that a fiduciary relationship in this case arose only as to the operation of the first well.

To establish the existence of a joint venture in this case plaintiff had the burden to prove, by clear and convincing evidence, the existence of an agreement between the parties in which the parties had a community of interest, common purpose in performance, and equal control. *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978). Such an agreement can be either express or implied from the conduct of the parties.

The plaintiff initially alleged in his petition that he and the defendant had entered into an oral agreement whereby they agreed to act as joint venturers as to the entire project. The plaintiff contends such agreements are customary in the industry and are enforceable through the imposition of a constructive trust, notwithstanding the statute of frauds.

The evidence concerning the existence of such an agreement and its terms was conflicting, and resolution of the many conflicts rested in determinations of credibility. There were no witnesses who had personal knowledge of an oral agreement between the parties, no writings evidencing its terms, and inconsistent versions of events.

The plaintiff testified that it was his understanding that the

parties would be equal partners in the entire project; that he was involved in the preliminary investigations for a drilling site; that the defendant had agreed to handle the negotiations with Gulf; and that, for that reason, the farmout agreement named the defendant as the lessee. There was evidence the two men had explored the possibilities of acquiring additional acres with an independent landman and the geologist on the project. Although there was some evidence of custom in the industry, that evidence was not particularly helpful to the plaintiff because each witness conceded participation in such ventures is dependent upon the agreement of the parties. Further, the plaintiff stated, in various independent actions, that his interest was limited to a 30-percent interest in the Willson-State well.

The defendant's evidence completely contradicted the plaintiff's. The defendant testified he had never told plaintiff they would be equal partners in the project, but had offered him only a limited interest in the first well. Several of the other working owners testified they had been offered the deal on a similar basis. There also was evidence that the two men had frequently been involved in separate transactions in the past, in which the other party often was offered only limited participation.

It seems clear that the parties had some agreement that the plaintiff would participate in the project prior to the drilling of the first well. The evidence, when taken as a whole, indicates the agreement was that the plaintiff would have a percentage ownership in only the first well. The evidence tends to show that the defendant, like the defendant in *Carey v. Humphries*, 171 Neb. 578, 107 N.W.2d 20 (1961), entered into the agreement with Gulf as a principal representing only his own interests, rather than as an agent representing the plaintiff's interests as well. There is no evidence the parties had an agreement to jointly acquire leases generally. In fact, the evidence supports a contrary finding. The two men often acquired separate interests which they were free to share, or not.

The plaintiff's alternative argument, that the close relationship between them created an implied joint venture, is also nonpersuasive for several reasons. First, as noted above, the relationship was premised on the right of each person to

enter into separate deals without the obligation of including the other. Second, while the existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, it alone is not generally sufficient. For example, in *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973), the court held that the fact that one businessman trusts another and relies on his promise to perform a contract does not create a constructive trust. The court held the plaintiff had to prove the existence of a fiduciary relationship separate from the agreement forming the basis of the suit to overcome the effect of the statute of frauds.

In *Greenbaum v. Kirkpatrick*, 129 F. Supp. 648 (W.D. Okla. 1955), the plaintiff sought to impose a constructive trust over certain oil and gas leases obtained by the defendant on the grounds of an alleged joint venture based on an oral agreement. The plaintiff alleged the parties had agreed to be equal partners, in that the defendant would obtain leases, plaintiff would obtain investors, and ownership would be divided equally. The plaintiff alleged he contacted investors and defendant contacted landowners, but after the defendant had acquired the leases he repudiated their agreement and gave an interest to a third party. The plaintiff contended the latter lessees held their interests on a constructive trust for plaintiff. The court held that the plaintiff had failed to prove the existence of the alleged agreement by clear and convincing evidence and that the preliminary negotiations between the parties were held with a view toward a future course of conduct rather than a present binding contract wherein their minds had met.

In *Hoover v. Cooke*, 566 S.W.2d 19 (Tex. Civ. App. 1978), a geologist brought suit against another geologist to impose a constructive trust upon certain mineral interests. In examining the types of relationships which must be proven to recover on an alleged abuse of such a relationship, the court made several observations.

> " 'A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another, on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly

enriched if he were permitted to retain the property.' "
Id. at 26 (quoting *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158 (1943)). The court further stated a constructive trust does not arise from the existence of a confidential relationship, but only where such a relationship was violated by an abuse of confidence rendering the acquisition or retention of property by one party unconscionable. The court stated such a remedy is not available for every moral wrong, and mere subjective trust alone will not suffice; the fact that one businessman trusts another is not enough.

" 'The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship. . . .' " *Hoover v. Cooke, supra* at 27. The opinion reasoned that " ' "[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality. . . ." ' " *Id.*

The court also deemed important the fact that, as a general rule, in arm's-length transactions where both businessmen stand on equal footing in terms of "education, ability, experience and business acumen . . . each party must exercise due care for the protection of his own interests, and a failure to do so is not excused by mere subjective trust or confidence in the honesty and integrity of the other party." *Id.*

Fiduciary duties extend only to dealings within the scope of that relationship. *Fuqua v. Taylor*, 683 S.W.2d 735 (Tex. App. 1984). In *Fuqua* the parties had entered into a written agreement whereby the defendant, a geologist, was designated as an operator for the drilling project. He later acquired a lease on a well, which the venture had allowed to expire, without informing his co-venturers. He had also acquired leases on nearby property. The court found he had breached his fiduciary relationship as to the expired lease but not as to the new lease on nearby land, because the latter was not within the scope of his fiduciary duties.

The evidence in this case fails to show the breach of a fiduciary duty. The parties were businessmen with equal stature, education, and experience. Their prior dealings, apart from the Evertson Well Service companies, were characterized by individual, rather than joint, undertakings. The plaintiff

could have protected his perceived interest in the project at the beginning. His involvement in the farmout agreement was on a limited, rather than an equal, basis, and the plaintiff did not object to those terms in a timely fashion or exercise due diligence to support his claims. Moreover, the plaintiff's actions and admissions in separate proceedings are in direct contravention to his claims here.

The plaintiff's evidence falls short of being clear and convincing.

The judgment is affirmed.

AFFIRMED.

ROSE J. ZYBACH, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

411 N.W.2d 627

Filed September 4, 1987. No. 86-358.

1. **Ordinances: Administrative Law: Judicial Notice: Appeal and Error.** Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
2. **Principal and Agent.** An attorney in fact has no implied or apparent authority to do that which the principal himself would not be authorized to do.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellant.

Joseph S. Ramirez of Legal Aid Society, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

The State of Nebraska, Department of Social Services (hereinafter Department), appeals the decision of the Platte County District Court reversing the finding and order of the director of the Department. The director's order had denied the

appellee, Rose J. Zybach, assistance to the aged, blind, and disabled, and medical assistance (AABD/MA).

The underlying procedural facts show that on June 5, 1985, Walter C. Zybach, the son of appellee, filed an "Application for Assistance" on behalf of appellee with the Department's Columbus, Nebraska, local office. The application sought AABD/MA benefits for appellee. The application was completed with the aid of department employees, was signed by Walter "for Rose Zybach," and showed that appellee was born on July 29, 1891, and had lived in a nursing home in Columbus since October 9, 1973. The application also set out that appellee had $3,359.01 in a checking account, a $5,000 certificate of deposit as a burial fund, and a burial space.

The Department's Columbus office investigated the situation and on August 5, 1985, issued its "Notice of Finding," determining that appellee was not eligible for assistance. This notice set out that the reason for such action was:

> As per 469 NAC 2-009.10 - An individual is ineligible if she deprives herself of resources by giving them away or by disposing of them for less than fair market value for the purpose of qualifying for assistance. The client [appellee] had been in a nursing home for a number of years; the son add [sic] Power of Attorney was well aware of her needs during the time the client's resources were being used by the POA for his own personal expenses. You may reapply when resources disposed of have been used to meet your mother's needs.

On August 9, 1985, Walter Zybach filed a "Notice and Petition for Fair Hearing" with the Department. This notice constituted an appeal to the director from the denial of assistance to appellee by the Department's local office, pursuant to Neb. Rev. Stat. § 68-1016 (Reissue 1986).

A hearing was held on this appeal, apparently by an administrative judge, on August 21, 1985. On September 18, 1985, the director of the Department issued a "Finding and Order" affirming the action of the Columbus local administrative office rejecting appellee's claim. Pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984), appellee timely appealed to the district court for Platte County by filing a

petition seeking reversal of the director's order. Defendants, Gina C. Dunning, Director, and the Department, answered by general denial.

The matter was submitted to the court on the certified "transcript of the proceedings in the matter of the administrative appeal of ROSE J. ZYBACH . . . ."

On March 31, 1986, the district court reversed the Department's order of September 18 and held that "the Plaintiff [appellee] should be entitled to benefits from August 5, 1985." The Department timely appealed to this court, assigning as error that "[t]he district court erred in holding that the action taken by the Department of Social Services in rejecting appellee's application for public assistance was unsupported by competent, material and substantial evidence and was arbitrary and capricious." We affirm.

The facts, as shown by the "transcription of the oral testimony given at the administrative hearing of August 21, 1985," and the exhibits received at that hearing, are as follows.

Appellee was first placed in the Columbus nursing home in 1973 at the suggestion of appellee's physician after appellee was found by her daughter-in-law, Walter's wife, Marjorie, "in bed, no clothes on, and her, and she and the scissors, her clothes were all cut up. There were frying pans on the stove, turned on, things were smoking . . . ." The son testified further that "we called our doctor in Omaha and he suggested we do this, put her in a home."

Walter testified that the appellee was incompetent at the time she entered the nursing home, that she had gotten much worse since entering the home, and that now she did not recognize him most of the time.

On May 25, 1974, a formal, 20-paragraph power of attorney was signed by the appellee, before a notary public, appointing her son, Walter Zybach, to act as her attorney in fact. Walter testified that he was advised appellee needed one "[t]o, to, when I had to borrow money that's the only way it could be done, the way I understood it." Walter further testified that when he took control of appellee's property with the power of attorney, "I understood we could use it any way we seen fit, that's the way I understood it."

At the time of the application for assistance, Walter and Marjorie Zybach explained to the worker processing appellee's application:

> [T]his was a different situation than a lot of people have with their parents. . . . [T]hat in about 1950, [appellee] had asked them to stay around Columbus and not take a job with a company in California, and that she would "make it right with them" if they took care of her and helped her out.

Walter testified that appellee did not talk about salary or inheritance but that her statement meant appellee would financially take care of them.

On June 6, 1985, a Department worker checked with the register of deeds and determined that appellee originally owned a tract of farmland, with several small tracts sold between the years of 1953 and 1981 "from which proceeds she had paid nursing home care, as stated by the son in the original interview." The worker further reported that in 1981 the remainder of appellee's land was sold for $194,990.

The land was sold by Walter Zybach as appellee's attorney in fact. The net proceeds of the sale were $140,126.68 after expenses from the sale, except for income tax. On July 7, 1981, appellee, by her attorney in fact, gave gifts of $10,000 to appellee's daughter and $9,500 each to Walter and Marjorie from the proceeds of the sale of appellee's land. Walter told appellant's employees that appellee told Walter they were to receive some of the proceeds from the sale of the farm.

Walter testified that after the sale of the land he paid off a $35,000 loan on the farm and paid a capital gains tax of $28,000. Walter kept very few records or canceled checks and testified that he did not know what happened to the rest of the money, but stated that he "used it for [appellee's] care, I used some for ours."

The record shows that on December 31, 1984, appellee had remaining assets of $35,045 in certificates of deposit. Walter submitted a statement of expenditures detailing how the $35,045 was spent. It included a $10,000 stone and funeral fund in Walter and Marjorie's name, which Walter testified was held in a certificate of deposit; auto, home, accident, and life

insurance for Walter and Marjorie, $856; prescription drugs for appellee, $163.26, and for Walter and Marjorie, $1,301; doctor bills for Walter and Marjorie, $3,893; beauty shop bills for appellee, $150.50; an irrevocable funeral trust for appellee, $3,000; nursing home costs for appellee, $9,063; and miscellaneous living expenses, $4,552.50; with a balance in appellee's checking account of $2,066. On June 3, 1985, the appellee had a checking account balance of $3,302.42.

Both Walter and Marjorie testified that they have heart conditions. On June 11, 1985, they told the Department worker that Marjorie had "heart surgery in Omaha 3 weeks ago that cost $18,000" and that "Walter had been . . . disabled since 1971. At that time he suffered a heart attack and was told to do very little work."

It was on this evidence that appellant, in its finding and order, found that appellee "had available for her use at the time of the application . . . $3,302.42 and the $10,000 certificate of deposit held by her attorney in fact in his and his wife's name. This gave [appellee] resources in excess of program guidelines." The director further found that appellee "deprived herself of resources in the amount of $10,602.24 since January" and that "the $35,045 . . . available for her care . . . was disposed of in order to qualify for public assistance."

We note that in an appeal to the district court from a final decision of an administrative agency, under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-919 (Reissue 1981 & Cum. Supp. 1984), the district court

> may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(f) Arbitrary or capricious.

§ 84-917(6) (Cum. Supp. 1984); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

The Supreme Court's review of an administrative agency's decision is de novo on the record. § 84-918 (Reissue 1981); *Haeffner v. State, supra; In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986). We have recognized that the scope of review from administrative agencies pursuant to statutes that provide specific procedures for appeal may be different. See *In re Application A-15738, ante* p. 146, 410 N.W.2d 101 (1987). In this case, no specific method of appeal is provided, and the scope of our review is de novo on the record.

Appellant argues in the brief on appeal that we need only consider the issues (1) whether appellee's resources were exhausted below the $1,600 maximum permitted to qualify for AABD/MA, on June 5, 1985, when appellee applied for assistance, and (2) whether appellee or her representative disposed of appellee's resources for the purpose of qualifying for public assistance.

With regard to its first contention, appellant asserts that at the time of appellee's application for assistance, her checking account was in excess of $3,000, which was over the $1,600 prescribed guideline for public assistance pursuant to Neb. Admin. Code tit. 469, ch. 2, §§ 2-009.08 and 2-009.09 (1985).

Section 2-009.09, which is set out in the record, concerns the consideration of the resources of a parent toward the eligibility of a child 18 or younger and has no application to appellee's case. Section 2-009.08 was not made a part of the record before us.

We have held:

> Courts have ordinarily refused to take judicial notice of municipal ordinances or internal operating rules of administrative agencies or other courts, and have required a party seeking the benefit of such provisions to plead and prove the existence of the ordinance or rule. [Citations omitted.] Where such rules and regulations do not appear in the record nor in the bill of exceptions in this court, the court will not take judicial notice, nor consider the

> validity, of the rule or rules or their application to the facts in the case.

Nevels v. State, 205 Neb. 642, 646, 289 N.W.2d 511, 513 (1980).

Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. *State v. Surber*, 221 Neb. 714, 380 N.W.2d 293 (1986); *Nevels v. State, supra*. We do not take judicial notice of § 2-009.08. Since § 2-009.08 does not appear in the record, we do not consider this issue.

We next consider appellant's contention that the next question to be resolved is whether the appellee or her representative, Walter Zybach, appellee's attorney in fact, disposed of appellee's resources for the purpose of qualifying for public assistance.

We first determine that appellant's question does not properly frame the issue. In this approach, appellant is relying on the provisions of Neb. Rev. Stat. § 68-1002 (Reissue 1986), which provides: "In order to qualify for assistance to the aged, blind or disabled, an individual: . . . (3) [must prove that the individual has] not deprived himself directly or indirectly of any property whatsoever for the purpose of qualifying for assistance to the aged, blind or disabled . . . ."

In applying this section of the statutes, appellant has adopted a regulation, which is in the record before us, entitled Neb. Admin. Code tit. 469, ch. 2, § 2-009.10 (1985), and which provides in part:

> An individual is ineligible if s/he deprives himself/herself of resources by giving them away or by disposing of them for less than fair market value for the purpose of qualifying for assistance. . . .
>
> . . . .
>
> The worker may also allow the client to produce evidence that may indicate the resource was disposed of for reasons other than to qualify for assistance (e.g., to repay debts) and, therefore does not affect eligibility.

In both the statute and the regulation, the disqualifying act is the act of depriving oneself of resources "for the purpose of qualifying for assistance." "Purpose," as used in both the statute and the regulation, means an "intention, or aim, object,

plan, project." Black's Law Dictionary 1112 (5th ed. 1979). An intention or plan requires intelligence to be applied to a problem in seeking a desired result.

In our de novo review, we find that appellee, Rose Zybach, did not at any pertinent time have sufficient mental capacity to do anything with any "purpose." While there was no medical testimony before the Department at the time of the administrative hearing, all the evidence submitted was to the effect that appellee was incompetent at the time she was admitted to the nursing home in 1973 and had gotten worse mentally with the passing years. The record also shows that at the time she allegedly acted with the "purpose of qualifying for assistance," appellee was nearly 94 years old and had been a resident of the nursing home for 12 years.

The only possible basis for holding that appellee had so acted would be that appellee had acted through her attorney in fact. Assuming, arguendo, that the attorney in fact had been properly appointed in May of 1974 and that appellee's incompetency had not terminated any power of attorney, the law is clear that any attorney in fact or agent has no implied or apparent authority to do that which the principal himself would not be authorized to do. *Johnson v. Shenandoah Life Insurance Company*, 291 Ala. 389, 281 So. 2d 636 (1973); 3 Am. Jur. 2d *Agency* § 71 (1986). In *Cooley v. Eskridge*, 125 Colo. 102, 113, 241 P.2d 851, 856-57 (1952), the Colorado Supreme Court stated: " 'It has been held that a servant can have no implied authority to do that which it could not be lawful, under any circumstances, for either him or his employer to do. . . .' " Section 68-1002(3) provides that it is unlawful for one to dispose of resources in order to qualify for assistance.

The dispositive fact that must be kept in mind is that appellee and her son, Walter, who is allegedly her attorney in fact, are two separate and distinct persons. Appellee apparently has no guardian. Appellee is a vulnerable older person who clearly needs assistance, either legal or financial. Through no fault of her own she has reached an age where she must rely on others. The carelessness or inattention of others cannot and should not be attributed to appellee.

We agree with the holding of the court in *Lee v. State*

Department of Public Health & Welfare, 480 S.W.2d 305, 309 (Mo. App. 1972), where the court stated: "Ergo, the statute condemns transfers produced or at least acquiesced in by a claimant; it does not undertake to discipline a claimant who is wholly passive in the matter and where the transfer results from the independent acts of third persons."

The fact is that this claimant needs assistance. That assistance must be provided to her, and the State may then take whatever steps it deems necessary to correct the situation. We find that appellee was entitled to assistance from the date of her application for assistance and that the order of the district court should be affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CASEY J. SLEZAK, APPELLANT.
411 N.W.2d 632

Filed September 4, 1987. No. 86-815.

1. **Prior Convictions: Right to Counsel: Waiver: Pleas.** To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
2. **Prior Convictions: Pleas: Drunk Driving.** For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert I. Blevens of Blevens, Blevens & Jacobs, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Defendant, Casey J. Slezak, appeals his convictions and sentences for driving while intoxicated, for which the court enhanced the penalty to that for third offense driving while intoxicated, and for attempted possession of a controlled substance. We affirm in part and reverse and remand in part.

On July 16, 1986, pursuant to a plea agreement, the State filed an amended information against defendant on two counts. Count I alleged that the defendant, "[o]n or about the 22nd day of February, 1986 . . . did . . . unlawfully and knowingly or intentionally attempt to possess a controlled substance other than marijuana, to wit: Cocaine . . . ." Count II alleged that the defendant,

> [o]n or about the 22nd day of February, 1986 . . . did then and there unlawfully operate or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor, or of any drug, or while the said person had ten hundreths [sic] of 1% or more by weight of alcohol in his blood, breath or urine, and further defendant has been previously convicted at least twice of Driving While Intoxicated, to wit: on or about June 12, 1982 in Grand Island, Nebraska and on or about September 24, 1983 in Seward, Nebraska.

Defendant entered a plea of guilty to each count on July 18, 1986. An enhancement hearing on count II was held on July 25. At this hearing the State offered exhibits 1 and 2, evidencing the alleged prior convictions of defendant for driving while intoxicated. Both exhibits were offered and received into evidence. Defendant's attorney stated defendant had no objection as to foundation of the two exhibits.

Exhibit 1 contains a certified copy of a complaint filed by the city of Grand Island against defendant for operating a motor vehicle while under the influence of alcohol and a journal entry from the Hall County Court with the judgment of conviction of defendant on July 9, 1982, for driving while intoxicated.

Exhibit 2 contains a copy of a "Uniform Citation and

Complaint" issued to defendant for speeding and unlawfully operating a motor vehicle while under the influence of alcohol, an arraignment checklist, and a sentencing order in the county court for Seward County for the defendant's conviction on November 7, 1983, for driving while intoxicated.

Defendant then offered facts in mitigation of the prior convictions, challenging only the validity of exhibit 1. Defendant argued that the 1982 conviction was not valid for purposes of the enhancement hearing because the defendant's guilty plea in that proceeding was not knowingly, voluntarily, and intelligently entered. Defendant's counsel asserted, "On the face of this Exhibit, Exhibit 1, it's extremely clear the parties appeared for trial, a hearing in chambers was held," and the attorney representing defendant at that time "withdrew the plea of not guilty and entered a plea of guilty. It says on the face of this, Your Honor, that Mr. Slezak never entered a plea of guilty in this case, it appears his attorney did on his behalf."

The journal entry in exhibit 1 states in pertinent part:

> On June 23, 1982, the above matter came on for hearing. The Defendant was present in Court with his attorney . . . . The Defendant was informed of his rights. A plea of not guilty was entered and the matter was set for trial.
>
> On July 9, 1982, the matter came on for trial. The Defendant was represented by [his attorney]. A hearing in chambers was held. [Defendant's attorney] withdrew the plea of not guilty and entered a plea of guilty. A factual basis was presented by the City for the charge. The Court accepted the plea and entered a finding of guilty.
>
> On September 1, 1982, sentencing was held on the above matter. The Defendant was present in Court accompanied by his attorney . . . .

The defendant testified at the enhancement hearing that he never entered a plea in the proceedings on July 9, 1982.

On July 25, 1986, the court found that "this is the defendant's third offense for driving while intoxicated and that the defendant is guilty of Count II as charged and judgment of conviction is entered."

On September 26, 1986, the court sentenced defendant to 3

months in the Sarpy County jail on each count, with the provision that the sentences be served concurrently; a $250 fine on count II; and revocation of the defendant's operator's license for a period of 15 years on count II. The defendant timely appeals.

Defendant assigns two errors: (1) The district court erred in improperly enhancing defendant's conviction on count II to driving while intoxicated, third offense; and (2) since the conviction was improperly enhanced, the sentence imposed was improper. Defendant does not challenge his conviction and sentence on count I.

Defendant contends that it is the burden of the State to prove the prior convictions on enhancement of a charge of driving while intoxicated. Defendant asserts that the State could not do so because the defendant's guilty plea in the Hall County proceedings was not entered knowingly, intelligently, and voluntarily, thereby making defendant's conviction invalid.

This court has held that the State's burden in proving a valid prior conviction for enhancement purposes is only to show that the defendant had counsel or knowingly and voluntarily waived counsel at the time of such conviction. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987); *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986).

Defendant asserts that Neb. Rev. Stat. § 39-669.07 (Reissue 1984) provides that a defendant may "make objections on the record regarding the validity of such prior convictions" and is not limited to "invalid convictions without legal representation." Brief for Appellant at 13. Defendant further asserts that objection to a conviction which shows on its face that the defendant was neither arraigned nor had explained to him the consequences of the waiver of his constitutional rights does not constitute a collateral attack upon that conviction.

We determine that the enhancement of defendant's sentence in this case was improper. The record before us does not show that defendant entered any plea to the 1982 charge. The record does not state that defendant was present when the plea was made and shows only that defendant's attorney entered a plea

of guilty for defendant to the charge. The record is silent as to whether defendant was informed by the trial court as to this plea.

There is not before us any allegation that defendant's attorney was acting on the directions of defendant or that defendant ratified the plea made by his attorney, and we need not consider herein such problems.

We adhere to our earlier rulings as set out above that to prove a prior conviction the State need only show that a defendant had, or waived, counsel. We add only that for a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under § 39-669.07, the record must show that the defendant entered the guilty plea to the charge.

Defendant's conviction on count I is affirmed. Defendant's conviction on count II is reversed and the cause remanded, on that count only, for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CENTER STATE BANK, SPECIAL CONSERVATOR OF THE ESTATE OF ROBERT J. HAWK, A MINOR, APPELLANT, V. DANA, LARSON, ROUBAL & ASSOCIATES, INC., A CORPORATION, APPELLEE.

411 N.W.2d 635

Filed September 4, 1987. No. 86-917.

1. **Negligence: Minors.** If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
2. _____: _____. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
3. _____: _____. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
4. **Negligence: Trial.** The question of the existence of negligence or contributory

negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.

5. **Negligence.** Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what a reasonably prudent person under the same circumstances would or should, in the exercise of reasonable care, have anticipated.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for a new trial on the issue of damages.

M.J. Bruckner and John V. Hendry of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., and Patrick J. Birmingham, for appellant.

Jewell, Gatz, Collins & Dreier, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a negligence action brought by plaintiff, Center State Bank, as special conservator of the estate of Robert J. Hawk, a minor born September 20, 1970, against Dana, Larson, Roubal & Associates, Inc., a corporation (hereafter DLR), for personal injuries received in the explosion and fire of propane gas escaping from an underground supply tank. Robert J. Hawk (Robert) was seriously burned. DLR was the architectural firm involved in the 1973-76 planning and construction of the Santee Elementary School, Santee, Nebraska. A $281,415.65 jury verdict was entered in favor of plaintiff against DLR.

Plaintiff's motion for a new trial on the issue of damages and defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial were both denied. Plaintiff appeals, assigning as errors that the trial court erred in (1) submitting the issue of contributory negligence of Robert in these particulars: in failing to leave an area which he knew, or in the exercise of reasonable care should have known, was

dangerous, and in going from a place of safety to a place of danger; (2) refusing to admit nine affidavits describing misconduct of the jury foreman; (3) failing to grant a new trial for jury misconduct; (4) failing to grant a new trial because the jury foreman failed to follow instructions when he reduced past damages as well as future damages to present value; (5) failing to submit to the jury Robert's past and future disfigurement; (6) failing to grant a new trial when the verdict was clearly inadequate and the result of passion, prejudice, mistake, and misconduct; and (7) failing to grant a new trial on the issue of damages only.

Propane gas is a commercial name given to liquefied petroleum gas. It is a gaseous heating material that, for transportation and storage, is liquefied under pressure. In the unpressurized liquid state it is about -40 °F, and it is stored in pressurized tanks. When used by the consumer, the pressure is released and the liquid is warmed by a vaporizer, which returns it to its original gaseous state for ignition.

At about 4 p.m. on August 26, 1983, Sam Ruiter, an employee of Dan Dugan Transport Company (Dugan), arrived with Dugan's truck at the Santee school grounds to deliver propane fuel into the school's underground storage tank. He parked the truck near a fence that surrounded a manhole where the intake valves for the storage tank were located. After connecting the hoses from the truck to the storage tank connections, he started the truck engine and commenced pumping the pressurized liquid propane into the pressurized storage tank. After about 20 minutes, he heard a popping noise; upon investigation, he discovered that propane was bubbling up out of the manhole, forming a white cloud that continued to grow until it finally covered most of the truck. Later investigation determined that a storage system connecting line in the manhole had split, allowing the liquid propane to escape. As a fire precaution, Ruiter immediately shut off the truck engine and shut off the valves on the truck to the delivery hoses. The cold temperature of the escaping propane and the cloud prevented him from closing the valves on the storage tank, leaving propane gas escaping from the storage tank. Ruiter went to the rear of the truck, proceeded toward the street, and

called to a man across the street, later identified as Marvin Buzzard, to get the Santee firetruck. Ruiter returned to the truck, and for the first time he saw children standing at the rear of the truck. Ruiter stayed in the truck area until after the explosion. He estimated the time from discovery of the leak to the explosion took 3 to 5 minutes. He received some burns to his body from the explosion.

The children that he saw were Robert J. Hawk, almost 13 years of age; Earl Crane, age 12; Lisa Crane, age 15; John Crane, age 10; Chris Campbell, age 4; Lonnie Campbell, age 7; and Angela Henry, age 6. They had left Robert's home and were walking across the school grounds en route to a nearby playground. The Dugan truck was parked across their path. As they neared the truck, Earl and John went to the front of the truck and Robert and the other children went around to the back of the truck and stood there observing a white cloud emerging under the truck.

Robert testified that he saw a white cloud that looked like burning leaves and asked the truckdriver, who was standing near the truck, "what was wrong." The driver did not answer, but only walked away. Ruiter denies this incident. Robert said that the cloud had a smell that he could not describe, but it was "awful"; that he had never smelled it before; that he did not know anything about propane; and that he did not know it was dangerous.

On cross-examination, Robert admitted that in an earlier deposition he gave answers indicating that the cloud smelled like rotten eggs; that the cooking stove at his home had the same smell, but not as strong; and that he held his nose because of the smell. He also said that he knew the truck was delivering material used to heat the school. On redirect Robert explained that he did not know why there was a smell around the stove at home and that he did not know that the smell was a warning of the presence of propane gas.

Soon, Robert decided to locate John and Earl. He walked up to the white cloud, looked in, and, not seeing anyone, he was walking away when the explosion occurred. In an earlier deposition, Robert had said that he took two steps into the white cloud and then stepped back, when the explosion

occurred. He described the white cloud as feeling cool. It was above 90 °F that day.

Ruiter testified that after noticing the children, who were all standing behind him at the back of the truck, he twice told them that they had better leave "because this would probably explode or it would explode" and that when he turned around the explosion occurred. Ruiter described the gas as having a smell, but the vapor "won't hurt" you when you are in it for a brief time.

Buzzard testified that when he first saw the white cloud, he drove his pickup truck down to the area where the propane facility was. He did not see any children near the truck when he talked to Ruiter, the truckdriver. Buzzard then drove to the fire department, encountering Richard Kitto on the way. By the time Buzzard came out of the fire department, the initial explosion had already taken place. A reenactment of Buzzard's actions, from the time of his first contact with Ruiter until after he came out of the firehouse, was timed to have taken 2 minutes and 45 seconds.

Kitto testified that he had just left the nearby community center building when he exchanged words with Buzzard. At that time he looked toward the Dugan truck and saw one figure that looked like an adult near the cab of the truck and two or three small figures at the back of the truck. He hollered loudly to the children, warning them that it was dangerous. The children did not react to his shouting, and he did not know if they heard him. Seconds after his last yell, the explosion occurred.

Angela Henry, one of the children, who was almost 7 years old at the time of the explosion, testified by deposition that Kitto told them twice to get away, and the explosion occurred right after the last warning. She said that Ruiter never said anything to the children and that all of the children except Lisa and herself were running in and out of the white cloud.

Edward McLean, an industrial engineer with 47 years of experience with propane systems, including 12 or 14 propane leaks similar to this case, described the changes in the leaking propane:

> What takes place is . . . the liquid is escaping under pressure. Whatever the temperature of the gas is in there

creates a pressure and on a hot day it could go as high as 140 pounds per square inch, that would be an 80 degree day. So with that kind of pressure squirting this liquid out even through a narrow opening it's still liquid at that point but as soon as it hits the atmosphere at the lower pressure it tends to vaporize. The vaporization is not complete and so in seeking warm air to boil this liquid there is a fog created just like a fog up on the lake here. That same type of fog is consistent of a lot of bubbles that haven't vaporized. It's simply breaking down of the liquid structure from a white, colorless liquid, like water, to a fog and when that is created it's seeking temperature to boil it into a colorless gas. And so that's why we have the fog that we talk about as having been created in this instance that—we have these small particles are seeking heat to boil at the outside temperature into a gas and, again, we're talking about seeking of about a thousand BTU of heat for every gallon of liquid that escapes.

It forms a fog.

Q- . . . Can the average individual be within the vapor area without really knowing it?

A- No.

Q- Can you see— I guess, does some of it become invisible toward the outer edge?

A- Yes, outer edge is where it gets enough temperature to vaporize these little fog bubbles, sure. It then turns into a gas and it's colorless.

Q- That's what I mean. So at the outer perimeters it can be there and you can't see it; is that right?

A- That's right.

Q- So you might think you're standing along the edge and you are actually standing in it?

A- Well, you wouldn't be standing in it very long because you can't breathe very well. You get out of it as soon as you realize that you're in it. You get farther away from it. But you see, it has no oxygen and therefore your lungs won't take it. But from the standpoint of the gas being formed, there is gas outside of this vapor fog, yes.

Q- Once that is ignited, if you are in it do you have any

chance at all to get out of it?

A- No, it's very fast. You can't run that fast.

A later investigation at the site revealed a crack in a pipe near the hub of a valve on the school's propane storage system. This pipe, which was the cause of the propane leak, the explosion, and Robert's injuries, was shown to be a "Schedule 40" type pipe, and the evidence established that it should have been a heavier "Schedule 80" pipe. Since DLR dismissed its cross-appeal on the trial court's failure to grant a directed verdict, no further facts are shown concerning the liability issue.

From the explosion and fire, Robert received extensive and severe burns to most of his body, requiring months of hospital care and medical expenses in excess of $84,000. There was evidence, if believed, showing he had other permanent injuries and damages exceeding $500,000.

Dugan, an original party defendant, was dismissed as a party during the trial.

We first discuss the issue of contributory negligence.

> "The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them. . . ."

Camerlinck v. Thomas, 209 Neb. 843, 858, 312 N.W.2d 260, 268 (1981).

> "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." . . .
>
> . . . .
>
> ". . . Likewise to be taken into account are the circumstances under which the child has lived, and his experience in encountering particular hazards, or the education he has received concerning them. . . ."

Id. at 858-59, 312 N.W.2d at 268.

What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.

Caradori v. Fitch, 200 Neb. 186, 263 N.W.2d 649 (1978); *Camerlinck v. Thomas, supra.*

"Negligence must be measured against the particular set of facts and circumstances which are present in each case." *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 638-39, 260 N.W.2d 601, 606 (1977).

"Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person." *Farmer v. S.M.S. Trucking Co.*, 180 Neb. 779, 782, 145 N.W.2d 922, 924 (1966).

> [T]he question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence . . . . It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.

Fangmeyer v. Reinwald, 200 Neb. 120, 124-25, 263 N.W.2d 428, 431 (1978).

" 'Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.' " *Oberhelman v. Blount*, 196 Neb. 42, 45, 241 N.W.2d 355, 358 (1976).

> "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated."

Lock v. Packard Flying Service, Inc., 185 Neb. 71, 73-74, 173 N.W.2d 516, 518-19 (1970).

The court's instruction No. 2 relating to the issues, burden of proof, and affirmative defenses generally follows NJI 2.02, including the affirmative defense of contributory negligence:

a. Plaintiff's ward Robert J. Hawk was himself negligent in one or more of the following particulars:

1. In failing to leave an area which he knew, or in the exercise of reasonable care should have known, was dangerous;

2. In going from a place of safety to a place of danger;

which were the proximate cause or a proximately contributing cause of his damages.

As to the second allegation of contributory negligence, "In going from a place of safety to a place of danger," there is no supporting evidence as to either the description, location, or limits of a safe area; however, the giving of that instruction was not prejudicial to plaintiff, since it is generally included in the first allegation of contributory negligence.

This limits the first claimed error to the statement, "In failing to leave an area which he knew, or in the exercise of reasonable care should have known, was dangerous."

In addition to the defendant's burden to prove this particular allegation of contributory negligence as fixed by the court's instructions, the unusual circumstances of this case require supporting evidence of (1) the location, description, and attributes identifying the alleged "dangerous area," and (2) the time when and if Robert became aware of being in the dangerous area.

Witness McLean testified that the gas continued to have dangerous burning capabilities after it mixed with air and became clear; the gas in all forms may have covered 50,000 square feet at the time of the explosion. Although the evidence does not establish any definitive limits of a "dangerous area" or "dangerous areas" before the explosion, it is clear that the known area affected by the after-the-fact explosion of the gas was a dangerous area which included an area 20 feet from the truck where Ruiter, the children, and Robert were standing at the time. Robert was always in that area from the time of his arrival until the explosion.

The only direct evidence about Robert's knowledge and awareness of the dangerous area is his own testimony that he did not know what propane was, that he did not know the area around the truck where he was standing and walking was

dangerous, and that he did not know the propane cloud was dangerous. At most, when he arrived he observed the white cloud, under the truck, that looked like burning leaves, and, exercising a child's inquisitive nature concerning this first-time situation, he asked Ruiter "what was wrong." At most, that question recognized an unusual circumstance not before seen by him; it was not a recognition of either danger or being in a dangerous area.

That brings us to the alternative questions. In the exercise of reasonable care, should Robert have known that he was in a dangerous area, and, if so, when should Robert have so known? These questions should be measured by the knowledge of a reasonable person under like circumstances.

Robert was almost 13 years of age at that time. His IQ was at least average, although he had a reading disability and he was about to repeat the sixth grade in school. He had no special skills or interests. He lived on the Santee Indian Reservation with his mother, Ardith Hawk.

The explosion scene, as it developed, was very unusual. First, none of the propane properties were known to Robert, and little was generally known to the public except that it was a heating fuel stored in tanks under pressure. Certainly, the changes that occurred to liquid propane when it was exposed to the open air, as described by McLean, were not generally known by the public or Robert. The leaking propane gas created an emergency situation that resulted in an explosion in about 3 minutes after Robert came upon the scene. The only adult present was the driver, Ruiter, who stayed around the truck as did Robert and the other children. Ruiter never left or attempted to leave the truck area, and he made no effort to get the children to leave except his warning, which occurred immediately before the explosion. The 3-minute time element and the fact that the adult, Ruiter, stayed in the truck area are important circumstances when considering Robert's conduct.

Defendant relies on Robert's testimony that he knew that the material coming out of the Dugan truck was used to heat the school; that the white cloud smelled bad; and that when he was in it, it was cool and he held his nose. Also, in retrospect, Robert admitted that the unlighted gas from the family

cookstove at his home smelled the same as the white cloud, but not as strong. None of this evidence identifies the explosive capabilities of propane gas under the existing circumstances.

There is evidence concerning warnings given to Robert and the children. Kitto testified that he yelled a warning to the children, but he did not know if they heard him. Angela Henry testified that she heard Kitto tell them twice to "get away." Robert did not hear such warnings. Ruiter testified that he warned the children. Whether or not these were effective warnings of the danger need not be determined, since in both instances the evidence shows that the explosion occurred within seconds (Kitto) or immediately (Ruiter), and for a warning to be effective it must be given in time to allow the person so warned to protect himself. *Schmidt v. Orton*, 190 Neb. 257, 207 N.W.2d 390 (1973).

After favoring defendant with resolution of conflicts and all reasonable inferences, we find that reasonable minds can draw but one conclusion, that Robert J. Hawk, under the circumstances, exercised the degree of care required of him, a child just under 13 years of age, *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981), and that he neither knew nor in the exercise of reasonable care should have known that he was in an area that was dangerous. For those reasons, the issue of Robert's contributory negligence should not have been given to the jury. Further, absent a special verdict on the issue, the giving of the companion instruction on comparative negligence was prejudicial to plaintiff on the issue of damages.

It is not necessary to discuss the other assigned errors.

Since the jury verdict established the liability of defendant, DLR, this cause should be remanded for a new trial on the limited issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

STATE OF NEBRASKA, APPELLANT, V. BRYANT C. SMITH, APPELLEE.

411 N.W.2d 641

Filed September 4, 1987. No. 87-635.

1. **Search Warrants: Evidence.** Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
2. **Constitutional Law: Search and Seizure.** Fourth amendment rights are personal rights, which may not be vicariously asserted.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley, for appellee.

BOSLAUGH, C.J., Pro Tem.

This is an appeal by the State under Neb. Rev. Stat. § 29-824 (Reissue 1985) from the order of the trial court sustaining the defendant's motions to suppress.

The defendant is charged with first degree murder and use of a firearm in the commission of a felony. On June 30, 1987, the defendant filed motions to suppress the use of any and all evidence obtained as a result of the searches of 4821 Boyd Street, Apartment 3, and 3216 North 24th Street, on February 26, 1987, by members of the Omaha Police Division. Paragraph 5 of the motions alleged that the warrants which authorized the searches were "John Doe" warrants, defective on their face, and invalid under the Constitutions of the United States and the State of Nebraska.

The trial court sustained the motions under the allegations contained in paragraph 5, but overruled the motions as to all other grounds alleged. It is from that order that the State has appealed.

The record shows that on February 26, 1987, the Omaha police applied for and obtained two search warrants. The first warrant authorized the search of

> 4821 Boyd Street, Apt. #3, Omaha, Douglas County, Nebraska, a red brick multifamily dwelling which is an apartment complex and any and all storage areas connected with that location . . . AND/OR the person of Bryant C. SMITH, black male, DOB 07-15-60, 5'5", 135 lbs., OPD#91017, Social Security #508-88-2880 and/or John or Jane DOE.

The second search warrant authorized the search of

> 3216 North 24th Street, Omaha, Douglas County, Nebraska, white wooden frame single family dwelling and all storage areas connected with this location, AND/OR the person of Ernestine MAPP, black female, DOB 03-14-51, 5'5", 202 lbs., black hair, brown eyes, Social Security number 508-66-7462 and/or John or Jane DOE.

The execution of these warrants resulted in the seizure of evidence from both of the above-mentioned premises. No evidence was seized from anyone's person. The defendant, Bryant C. Smith, was subsequently charged with first degree murder and use of a firearm to commit a felony.

In sustaining the motions to suppress, the trial court relied upon our decision in *State v. Pecha*, 225 Neb. 673, 407 N.W.2d 760 (1987). In the *Pecha* case we held that the search of the defendant was invalid where he was not identified in the warrant other than as " 'John . . . DOE . . . who resides or is in control of the afore described premises,' " *id.* at 676, 407 N.W.2d at 763, and the affidavit upon which the warrant was obtained disclosed no probable cause for a search of the defendant.

The defendant argues that *Pecha* should be read to mean that the warrants in this case were facially invalid and therefore *any* search authorized under such a warrant was invalid. As in *Pecha*, the affidavits filed in this case made no reference to a belief by the affiant that unknown individuals were involved in illegal activity on the premises, nor was any evidence presented that unknown individuals were residing in or in control of the premises to be searched. The critical difference, however, is that *Pecha* involved a search and the seizure of evidence from a John Doe, for which no probable cause existed. In the present case no John Doe was searched.

The State contends that evidence seized in an otherwise valid search of the premises should not be suppressed where no John Doe was actually searched.

The issue is whether the *Pecha* decision should be interpreted to hold that the inclusion of John/Jane Doe language renders the *entire* warrant defective on its face (as a general warrant) or whether *Pecha* held the warrant to be defective as a general warrant only *as to the John Doe actually searched.* More specifically, does the inclusion of John/Jane Doe language invalidate an otherwise valid search of the premises?

In *United States v. Fitzgerald, on reh'g en banc* 724 F.2d 633 (8th Cir. 1983), the U.S. Court of Appeals for the Eighth Circuit held that the general parts of a warrant may be severed, and only those items seized which would not have been seized pursuant to the specific parts of the warrant should be suppressed. The court said at 636-37:

> Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits, and several states, have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain-view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment.

In *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), we held: "Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant." (Syllabus of the court.) See, also, *Com. v. Truax*, 397 Mass. 174, 490

N.E.2d 425 (1986); *People v. Hicks*, 49 Ill. App. 3d 421, 364 N.E.2d 440 (1977); *People v. Paul*, 96 Misc. 2d 1085, 410 N.Y.S.2d 516 (1978); *Fowler v. State*, 128 Ga. App. 501, 197 S.E.2d 502 (1973); *Saunders v. State*, 199 Md. 568, 87 A.2d 618 (1952); *Salmon v. State*, 2 Md. App. 513, 235 A.2d 758 (1967); *State v. Masco*, 103 N.J. Super. 277, 247 A.2d 136 (1968); *State v. Halverson*, 21 Wash. App. 35, 584 P.2d 408 (1978).

There is a further issue of standing insofar as the search of the North 24th Street premises is concerned. The record does not show any basis upon which the defendant could have an expectation of privacy at that location.

As we held in *State v. Kenny*, 224 Neb. 638, 640-41, 399 N.W.2d 821, 824 (1987), quoting from *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' "

The order sustaining the motion to suppress upon the grounds alleged in the fifth paragraph of the motion was erroneous. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CLAYTON RAHMIG, APPELLEE, V. MOSLEY MACHINERY COMPANY, INC., APPELLANT.

412 N.W.2d 56

Filed September 11, 1987. No. 85-529.

1. **Products Liability: Actions: Negligence.** In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
2. _____: _____: _____. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
3. **Products Liability: Proof.** To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
4. _____: _____. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
5. _____: _____. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
6. **Rules of Evidence: Negligence.** Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
7. **Rules of Evidence: Negligence: Proof.** Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
8. **Rules of Evidence: Impeachment.** Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent

repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.

9. **Directed Verdict.** In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
10. **Products Liability.** Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect.
11. **Products Liability: Words and Phrases.** In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
12. **Products Liability.** A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect.
13. _____. In a products liability case, misuse is not an aspect of assumption of risk.
14. **Negligence: Directed Verdict.** Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
15. **Products Liability: Negligence.** Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
16. **Trial: Appeal and Error.** In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
17. _____: _____. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
18. **Rules of Evidence: Jurors: Affidavits.** Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
19. _____: _____: _____. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
20. **Products Liability: Proof: Case Overruled.** Insofar as *Nerud v. Haybuster*

Mfg., 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Francis L. Winner of Winner, Nichols, Douglas and Kelly, for appellant.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., and Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

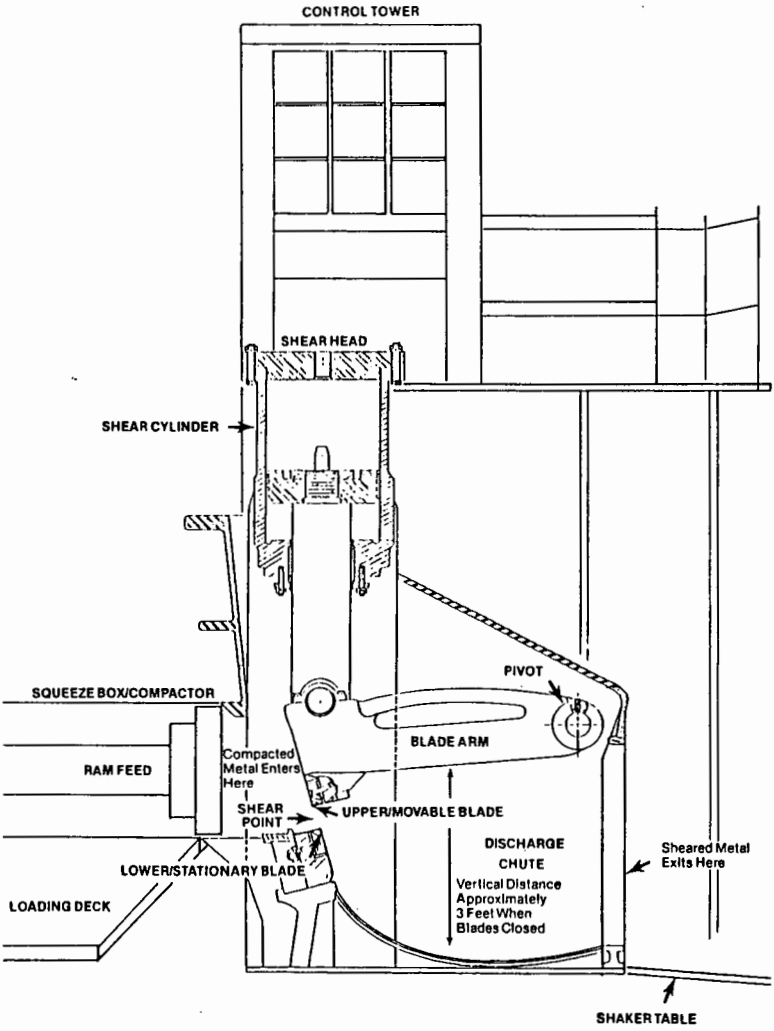
SHANAHAN, J.

Mosley Machinery Company, Inc., appeals the judgment entered on the verdict for Clayton Rahmig in a personal injury action based on a products liability claim for damages caused by a guillotine metal scrap shear manufactured by Mosley. We affirm.

THE MONSTER

In 1979, Mosley manufactured a 500-ton guillotine scrap shear for use in the scrap metal business, marketed the shear with the trade name "Monster," and delivered one such shear to Rahmig's employer, Scottsbluff Pipe & Supply, Inc. The Monster was "capable of sizing and shearing two car frames simultaneously" and could "crush car blocks . . . or break engine blocks." The Monster had several parts and points important to Rahmig's claim: a loading deck; ram feed; squeeze box, or compactor; shear head, containing a shear cylinder and blades for cutting the compacted scrap metal; shear point, where the blades came together; discharge chute, as a conduit for metal sheared by the Monster; and a shaker table, where sheared metal, having moved from the Monster, came to rest

before removal by a crane. The Monster was operated from a control tower above the shear head.



Scrap metal, having been placed on the Monster's loading deck, was compacted (squeeze box) and then pushed (ram feed) into an opening at the shear point in the Monster's cutting chamber, where a 30-inch blade, located at the end of a 2-ton pivoting blade-arm, was pushed downward by a piston in the hydraulic shear cylinder. The movable blade, or shear, made contact with a stationary blade at the shear point, cutting the compacted scrap metal in an action similar to a scissors or guillotine. After metal had been sheared by the two blades, the sheared metal dropped into a slightly descending discharge chute or funnel located adjacent to the bottom, or stationary, blade. When the movable blade is at the shear point, the blade-arm is in a nearly horizontal plane, reducing the size of the cutting chamber to a height of 3 feet, which corresponds with the height of the discharge chute. As metal was cut, any previously sheared metal in the discharge chute was forced through and out the chute onto the shaker table for removal by a crane. The piston then raised the blade-arm to repeat the cycle. The Monster was not self-cleaning, that is, it contained no mechanical apparatus for expulsion or extraction of sheared metal. Any change in the type of metal being processed through the Monster required that previously sheared metal remaining in the discharge chute be removed manually from the chute before a different metal was inserted into the shearing process of the Monster.

MECHANICS OF THE MONSTER AND ACCIDENT

The owner's manual for the Monster did not contain any recommended procedure for removing sheared metal from the area at the shear point or discharge chute. The manual, however, did provide a two-step procedure for changing the Monster's blades, namely, remove or "clean out" all metal in the discharge chute and, after raising the movable blade, use a block, such as a 4-inch by 4-inch oak block, between the raised blade and the floor of the discharge chute to prevent downward movement of the movable blade. Such procedure required someone to enter the chute, fix the block, and remove "blade bolts from inside the discharge box."

According to Henry Buhr, Rahmig's foreman at the scrap yard, there were no tools available for cleaning out the cut scrap

iron—"all we had was our hands." For some time before the accident, Buhr and other employees at the scrap yard had observed that the Monster's upper, or movable, blade would "stay up" if the machine were left running with its controls in the "up" position, which maintained hydraulic pressure in the shear cylinder and kept the blade-arm elevated. Without hydraulic pressure, the blade-arm would slowly descend and eventually come to rest at the shear point. Throughout past operation of the Monster at the scrap yard, the upper, or movable, blade had never unexpectedly descended. Sometime before the accident, Buhr noticed the Monster's main cylinder in the shear head was leaking oil and had "blown" some O-rings, apparently some type of gasket on the shear cylinder. One of Rahmig's fellow employees, Lee Navorette, described the usual situation in manually removing the sheared metal from the cutting chamber and discharge chute as "cramped and really oily . . . you had no place to put your hands," with no way to maintain balance within the chute except by placing one's hand on the "bottom part of the blade," that is, on the stationary, or lower, blade in the cutting chamber.

In August 1980, Rahmig, 21 years of age, had been operating the Monster to shear cast iron when Buhr decided to change from cast iron to steel as the metal being processed by the Monster. While the Monster was left running, with its controls locked in the "up" position, Rahmig descended from the control tower to help Buhr in removing sheared metal from the discharge chute. With the Monster's controls locked in the "up" position, Rahmig as well as his coemployees understood that the machine was "safe" and that the blade-arm would not descend.

Buhr and Rahmig stood beside the Monster, near the end of its discharge chute, and manually removed most of the sheared metal from the discharge chute. When sufficient metal had been removed to permit someone's entry into the chute, Buhr went to a nearby crane to load scrap metal. Rahmig crawled inside the Monster's discharge chute, where he crouched and started "kicking the iron out" with his boot. Pieces of sheared metal weighed between 25 and 50 pounds. To steady himself in such cramped quarters, Rahmig put his left hand on the

stationary blade in the cutting chamber and resumed cleaning metal from the chute. Without any forewarning, the upper blade suddenly descended, traumatically amputating three of Rahmig's four fingers on his left hand and so crushing a fourth finger that Rahmig had to "finish tearing . . . off" that finger to extricate himself from the blades. Rahmig climbed from the Monster and went to Henry Buhr, to whom he yelled that "I had cut my fingers off." Buhr drove Rahmig to the hospital.

PLEADINGS

In his petition, Rahmig alleged that the Monster was a defective product manufactured by Mosley and asserted that the Monster was "unsafely designed" without safeguard against unexpected descent by the movable blade, making the Monster "unreasonably dangerous." Rahmig further alleged that the defects in the Monster "could have been easily and economically remedied by devices within the state of art of design of machines of similar types." Also, Rahmig asserted that Mosley was negligent in designing the Monster and, with reference to the sudden and unexpected descent of the Monster's upper blade, in "failing to adequately warn . . . foreseeable users, of dangers inherent in the design and use of the product, and not readily apparent to foreseeable users of the product." Rahmig, therefore, sought damages from Mosley on account of its strict liability (design defect) and negligence (defective design and failure to warn) regarding manufacture of the Monster.

In its amended answer, which, for the most part, was a general denial, Mosley denied liability and raised the affirmative defenses of contributory negligence and assumption of risk. Mosley then specifically alleged that there were no defects in the Monster's design, which conformed with the "state of the art" existing at the time of manufacture.

PRETRIAL MOTION

At a pretrial hearing on Mosley's motion in limine to preclude certain evidence, the court asked Mosley's lawyer whether Mosley "is going to make feasibility an issue in this case?" Mosley's lawyer responded: "No, we're not." Mosley then objected to Rahmig's prospective presentation of evidence about Mosley's alterations on the Monster after Rahmig's

accident. The prospective evidence was two photographs (exhibits 56 and 57), which depicted a lockpin safety device installed in Mosley's shear machines sometime after Rahmig's accident, and exhibit 16, an intracompany memorandum, dated March 27, 1981, which directed that warning signs must be placed on any Monster shipped after the date of the memorandum. Mosley contended that the prospective evidence related to subsequent remedial measures for the Monster.

Directing the court's attention to *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), one of Rahmig's lawyers told the court: "We are offering [lockpin evidence] to show state of the art . . . that the state of the art would have required something like [the lockpin]." Still referring to *Nerud*, another of Rahmig's lawyers called the court's attention to the burden of proof placed on a plaintiff in a products liability case based on negligent design: "In the proper application of a risk versus utility analysis to a negligent design case, one of the factors which must be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs," *id.* at 612-13, 340 N.W.2d at 375, and a case based on strict liability (design defect): "[A] plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," *id.* at 614, 340 N.W.2d at 375.

After the preceding excerpts from *Nerud*, Rahmig's counsel continued:

> And since that is a *new element of proof*, the Supreme Court has said that *must be shown*, then we have to show feasibility, not just to rebut the defenses, but also through the front door of showing feasibility . . . technologically and economically feasible design as part of our case in chief.

(Emphasis supplied.) The court took Mosley's motion under advisement and overruled that motion on the morning of trial, when Mosley's lawyer then renewed the objection reflected in the motion in limine. During trial, Mosley objected when exhibits 56, 57, and 16 were offered and received into evidence, on the basis that those exhibits related to Mosley's remedial measures taken after the Rahmig accident.

BACKGROUND OF DESIGN DEFECT

As general background regarding the Monster's use at the scrap yard, Rahmig called witnesses who established that, throughout the Monster's operation at Scottsbluff Pipe & Supply, the movable blade had never unexpectedly descended during the course of manual cleaning. Because there was minimal clearance in the cutting chamber when the blade-arm was in a lowered position, it was standard procedure in the cleaning process to leave the Monster running, with its controls locked in the "up" position. Attempted use of wooden blocks resulted in crushed blocks or a situation where the blocks would "kick out" of their propped position as the blade-arm slowly descended. Mosley admitted that it did not provide any tool or instrument to remove sheared metal from the cutting chamber or discharge chute.

John McDonough, a service manager for Mosley but called as a Rahmig witness, testified that cleaning scrap metal from the Monster did not require anyone's entry into the discharge chute if a tool of some nature were utilized, although Mosley had already admitted it did not supply any cleaning tool with the Monster. McDonough acknowledged that no information was given to the Monster's purchasers regarding acquisition of such unspecified tool. McDonough admitted that the Monster was not self-cleaning, that is, once any metal was cut, "you're going to be left with whatever the last materials were that were processed in the discharge chute," and that cleaning the Monster necessitated manual removal of metal from the discharge chute. McDonough further acknowledged that when the Monster was running with its controls in the "up" position, one is justified in believing that the upper, or movable, blade will remain in its elevated position.

RAHMIG'S EXPERT WITNESS

As an expert witness, Dr. Igor L. Paul testified for Rahmig. Dr. Paul, a professor of mechanical engineering at Massachusetts Institute of Technology, was a design consultant specializing in hydraulic systems such as that found in the Monster and other scrap shears. According to Dr. Paul, "foreseeability for a human to act, not necessarily to his best interest, is one of the prime reasons for providing safety

controls and safety devices on all kinds of machinery." Dr. Paul expressed:

> [T]he very basic premise . . . is essentially that a machine or a product should not provide a hazard or risk of serious injury to the user or somebody around the machine under foreseeable use of the equipment, or the product. And, any machine that retains such a hazard should at the very least have warnings.

In view of the Monster's design, Dr. Paul felt that the "primary and largest hazard" of the machine was the "shear point of the cutting blade . . . so that both the cutting blade and the arm are extreme dangers to anybody who is either near the shear point or in the chamber of the shear." Dr. Paul observed that

> it was clear to me and would have to be clear to any engineer, that in fact a person has to go inside the [Monster's] chamber . . . to . . . clean out the scrap . . . .
>
> Scrap, cleaning out of scrap inside the chamber has to be performed both in terms of normal cleaning out, and prior to maintaining the cutting shear.

To prevent unexpected descent of the blade-arm, there should have been a "mechanical interlock" or "lockpin" on the Monster, but there was none. Dr. Paul described an interlock system and lockpin device as alternative safety measures which should have been incorporated into the Monster. An interlock is a hydraulic system in addition to and independent of a machine's basic hydraulic system, which mechanically locks the shear in a safe position, regardless of the "conditions of the controls" on the Monster. At a cost of $300 to $400, such interlock system would have prevented Rahmig's accident. As an alternative to the interlock system, a "safety pin," or lockpin, might have been used, that is, a metal bolt or shaft inserted from the outside and into an opening in the Monster's side, thereby obstructing the descent of the blade-arm. However, there was the possibility that forceful downward movement of the blade-arm might shear such "lockpin" inserted as a safety measure. As designed, the Monster's blade-arm was held up by a "dubious hydraulic circuit." Dr. Paul expressed an opinion that Mosley should have placed "an effective and distinct warning" on the Monster,

calling attention to the hazard resulting from the unexpected descent of the blade-arm. Dr. Paul expressed a further opinion that, from an "engineering standpoint," it was "certainly foreseeable" that removal of scrap from the Monster's cutting chamber would involve someone's presence inside the machine—likely someone who was unfamiliar with the "inner workings of a hydraulic system" and unaware of the "inherent danger" in the deficient hydraulic system in relation to the Monster's upper blade in an elevated position. From an engineer's standpoint in view of the Monster's design, it was foreseeable that a person's presence within the cutting chamber or discharge chute necessitated placing one's hand on the surface of the stationary blade, which was the "only surface" available for support to steady one inside the "cramped chamber."

COURT'S ORAL ADMONITION TO JURY

In the course of his testimony, Dr. Paul referred to two photographs, which showed a lockpin safety device incorporated by Mosley, apparently in 1981 or 1982, into its scrap shears. At the conclusion of Dr. Paul's testimony, the court orally and generally informed the jury about Rahmig's two "theories of recovery"—negligence and strict liability—and the jury's permissible consideration of the photographs in reference to Rahmig's two causes of action. Mosley made no response to the court's oral admonition to the jury.

ADVERSE WITNESS MAYNE

Rahmig also called John Mayne, assistant to the president of Mosley Machinery Co., who characterized Scottsbluff Pipe & Supply's employees as "foreseeable" users of the Monster and persons who reasonably could expect that the Monster's blade-arm would "stay up" as a result of the machine's controls in the "up" position. Mayne admitted that technology for a mechanical interlock system existed in 1979, when the Monster was manufactured, and that technology also existed in 1979 regarding a lockpin as a safety device on shear machines. Mayne acknowledged that unexpected descent of the Monster's upper blade was one of the hazards of the machine. According to Mayne, "blocking or using pins" was the standard in the

industry for preventing unexpected descent of the upper blade in machines such as the Monster, and a broom or some other instrument should have been used for cleaning or removal of sheared metal, rather than personal entry into the Monster. Mayne believed that anyone who had observed the Monster in operation would appreciate the danger of "putting any part of his body" into the opening at the shear point. Mayne testified that the Monster reflected the "state of the art" in shear machines, although the state of the art was set by Mosley and one other major manufacturer of shear machines. In answer to a question by Rahmig's lawyer, whether lockpins would have been an economically prohibitive feature of the Monster, which sold for $217,000, Mayne expressed his opinion that such safety device would have cost less than $1,000, an additional cost which would not deter potential buyers from purchasing the Monster. Rahmig's lawyer then questioned Mayne about two photographs (exhibits 56 and 57), which depicted a lockpin installed in a Mosley shear machine after Rahmig's accident. Over objection, those photographs were admitted into evidence.

Still as an adverse witness, Mayne acknowledged that a manufacturer "has got the duty to utilize all steps which are technically available and cost feasible to make his machine as safe as possible." Mayne testified that the Monster did comply with the "state of the art" as such existed in 1979. Further, Mayne agreed that Mosley, as a manufacturer, had a duty to recognize and follow the "warning standards" published by the American National Standards Institute, Inc. (ANSI), which standards represented the "state of the art" in 1979, when the Monster was manufactured. At page 7 of ANSI standard Z35.1-1972, the following appears: "Hazards should be eliminated wherever possible, but if they cannot be eliminated, the employee should be informed of the hazard by signs posted to give warning." However, when asked about warning signs on the Monster shipped to Scottsbluff Pipe & Supply, Mayne answered that he did not know what warning signs were on the Monster because "I did not see the machine when it was shipped." Rahmig's lawyer produced a memorandum from a Dennis Fortino, Mosley's vice president of marketing, to "three

individuals within the company." The memo was dated March 27, 1981, and directed: "Enclosed is a listing of safety signs to be used on the machines with drawings shown where they go. No machine should ship without these signs being on them." As directed by the memorandum, various warning signs were to be placed on Mosley's shears, such as in the area of a Monster's discharge chute, warning against climbing on the machine "With Power On," and "DANGER—Keep Away." No particular sign warned about the possibility of an unexpected descent by the upper, or movable, blade.

CROSS-EXAMINATION OF RAHMIG'S WITNESS

During cross-examination of Lee Navorette, Mosley's counsel interrogated concerning Navorette's presence in the Monster's cutting chamber and whether Navorette had refrained from placing his hand on the stationary blade "because it was dangerous." Navorette responded, "I suppose so." On redirect examination, Navorette acknowledged that the stationary blade was "probably where you would put your hand," inasmuch as the blade afforded the only place to "lean" in the discharge chute. At the conclusion of redirect examination of Navorette, Mosley's counsel asked: "Could I ask a question?" The court responded: "No, you would probably get into a new area, this is proper redirect, and the last time everybody started asking too many questions. We'll just go to direct, cross and redirect. And, therefore, [Navorette] may step down." Mosley made no offer of proof or otherwise expressed any further question to be asked of Navorette.

MOSLEY'S EXPERT

As part of its defense, Mosley called Bob Schliem, an expert witness. Schliem was a consultant engineer and accident reconstructionist regarding machine failure such as occurred with the Mosley Monster. Schliem testified that the Monster was not "designed defectively," and "shoring" (using blocks) was an acceptable precaution minimizing the hazard involved in the Monster's shearing function and cycle. Under the circumstances, Schliem believed it was "[v]ery dangerous" for Rahmig to put his hand on the Monster's lower blade. Concerning Dr. Paul's testimony, Schliem acknowledged that installation of an interlocking system as a safety device on a

shear machine had "certain merits," but "I would be leary about putting a device on without considerable direct feedback as to what that device was doing when it's supposed to be doing [its] thing." [?] Schliem expressed his doubt concerning the alternative safety devices suggested by Dr. Paul, namely, the interlocking system and lockpins. The use of a wooden block, according to Schliem, was a "reasonable accident prevention measure." Schliem felt that the responsibility for warning about potential dangers of the Monster rested primarily on the owner of the Monster rather than on the manufacturer, especially since any warning sign might be covered by paint applied by the manufacturer or the user of the machine.

RAHMIG'S DAMAGES

At the time of the accident, Rahmig was earning $214 per week. After the accident and on account of his injury, Rahmig was unable to work for approximately 10 weeks, and incurred medical expenses of $2,300. An orthopedic surgeon testified that Rahmig had permanent impairment estimated at 24 percent of Rahmig's entire left hand, taking into account "pain and disability doing things" and including "problems in cold weather." Rahmig testified that he had occasional numbness in his left hand, with hypersensitivity during cold weather, thereby restricting any employment requiring outdoor work the year around. A former employer refused to hire Rahmig after the accident because Rahmig had difficulty in handling tools and working outside in cold weather. When Rahmig's hand bumped into anything, he experienced pain. Rahmig has displayed an inability to handle tools and grip objects. For example, on account of his poor or impaired grip, Rahmig dropped two fishing poles over the side of a boat.

Rahmig, with a high school education at the time of trial, had been active in athletics, but no longer participated in such activities because he continues to experience restricted dexterity with his left hand. Other recreational activities are more laborious as the result of Rahmig's poor grip. Rahmig has become severely depressed and remains self-conscious of his injury when he is around other people.

JURY VERDICT

In its instruction on any damages which might be awarded on

Mosley's liability, the court informed the jury concerning various permissible elements of damages under the circumstances. The damages instruction did not mention that a fee for Rahmig's attorneys or tax consequences of an award were not proper considerations in determining the amount of damages. The jury returned a general verdict for $120,000.

MOSLEY'S MOTION FOR NEW TRIAL

In its motion for a new trial, Mosley alleged jury misconduct and excessiveness of the verdict. Mosley offered affidavits from three jurors, stating that during deliberations a juror remarked that Rahmig would have to pay his attorneys a fee, as well as pay income tax on any award. Such remark influenced the jurors, who increased their award to Rahmig. The court sustained Rahmig's objection to the affidavits.

ASSIGNMENTS OF ERROR

Mosley's first assignment of error may be summarized as expressed in its brief: "The theory of strict liability should not have been submitted to the jury, being not only barred by the plaintiff's assumption of the risk, but also not having been proven by a preponderance of the evidence. There was no submissible cause of action" regarding strict liability (design defect). Brief for Appellant at 21.

Mosley's other assignments of error are allegations that the trial court erred in (1) admitting exhibits 56 and 57 (photographs) and the March 27, 1981, memorandum reflecting postaccident matters; (2) denying Mosley a directed verdict, because Rahmig assumed the risk and his contributory negligence, as a matter of law, barred recovery; (3) giving oral instructions to the jury on Rahmig's "theories of recovery"; (4) prohibiting Mosley's recross-examination of Lee Navorette; (5) precluding use of affidavits reciting the jury's consideration of an attorney fee for Rahmig's counsel and the possible effect of income taxation regarding an award to Rahmig; and (6) denying a new trial on account of an excessive verdict.

STRICT LIABILITY FOR DEFECTIVE DESIGN

As expressed in *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 610-11, 340 N.W.2d 369, 373-74 (1983):

> In products liability litigation the notion of a defective product embraces two separate concepts. The first,

> commonly labeled a manufacturing defect, is one in which the product differs from the specifications and plan of the manufacturer. . . .
>
> The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a design defect. . . .

In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous. See, *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986).

In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971), this court, recognizing a manufacturer's strict liability in tort, stated: "We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product."

Also, in *Kohler*, this court adopted the user-contemplation test contained in Restatement (Second) of Torts § 402 A (1965) and, for a recovery based on strict liability in tort, approved the following instruction:

> "To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: 1. The defendant placed the [product] in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the [product] would be used without inspection for defects . . . ; 2. The [product] was in a defective condition at the time it was placed on the market and left the defendant's possession;

> 3. The plaintiff was unaware of the claimed defect; 4. The claimed defect was the proximate cause or a proximately contributing cause of any injury to the plaintiff occurring while the [product] was being used in the way and for the general purpose for which it was designed and intended; 5. The defect, if it existed, made the [product] unreasonably dangerous and unsafe for its intended use; 6. The plaintiff sustained damages as the direct and proximate result of the claimed defect . . . ."

187 Neb. at 436, 191 N.W.2d at 607.

After *Kohler v. Ford Motor Co., supra*, this court decided *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979), which involved causes of action for negligence and strict liability regarding a manufacturer's "defectively designed" automobile bumper. After reaffirming the user-contemplation test (the Restatement, *supra*) adopted in *Kohler*, the *Hancock* court referred to the elements of strict liability enunciated in *Kohler, supra*, and stated: "[A] plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect." (Emphasis omitted.) 204 Neb. at 486, 283 N.W.2d at 38. Further, in *Hancock*, and referring to a "strict liability case," this court also commented on "reasonable and economical alternatives" in relation to a claim based on strict liability for defective design of a product:

> The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done. [Citations omitted.] Plaintiff tendered evidence that there were alternatives which could be used and which, if used, would have prevented the enhanced injury. There was evidence that Paccar was using some of the alternatives itself and that both the material and the knowledge to design a safer alternative existed. That evidence included the use of a shorter bumper, a breakaway bumper, or a stronger bumper, all of which could have been designed in 1969. The jury was not required to accept any of those suggestions. Nevertheless, those were questions of fact which the jury had to resolve.

204 Neb. at 480, 283 N.W.2d at 35.

Four years after *Hancock v. Paccar, Inc., supra*, this court decided *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), which involved a claim for products liability as the result of a design defect. Nerud alleged two causes of action—one based on negligent design and the other based on strict liability—concerning a haystacking machine. In *Nerud* the court noted a "paucity of precedent" on the question whether, in a negligent design case, a plaintiff must demonstrate how the defectively designed product could have been made safer, but suggested that "such a requirement [was] hinted at in *Hancock v. Paccar, Inc.*, [*supra*]." 215 Neb. at 612, 340 N.W.2d at 374. Regarding strict liability (design defect), the *Nerud* court then concluded:

> Restatement (Second) of Torts § 402A at 347-48 (1965) in relevant part provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."
>
> This court has defined the term "unreasonably dangerous" to mean that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).
>
> We have not, however, had an opportunity to define the term "defective condition." . . . Our review of the cases has led us to the conclusion that a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer. . . . As such, Nerud has failed to show that the haystackers in question were defective. Absent such a showing, his recovery under a strict liability theory cannot be successful.

215 Neb. at 614-15, 340 N.W.2d at 375-76.

Therefore, when Rahmig's case was tried, to recover on a claim of strict liability in tort for a defectively designed product,

a plaintiff was required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect was the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; (5) some practicable way or feasible alternative to make the product safer; and (6) plaintiff's damages were a direct and proximate result of the alleged defect. See, *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Nerud v. Haybuster Mfg., supra.*

In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer. See *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976). Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact. *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562 (Ind. App. 1986).

The user-contemplation test embodied in Restatement (Second) of Torts § 402 A (1965) has been criticized by an increasing number of courts and commentators.

As expressed in Prosser and Keeton on the Law of Torts, *Products Liability* § 99 (5th ed. 1984), at least three reasons exist to show the general inadequacy of the user-contemplation test in determining whether a design makes a product dangerous:

> (1) Under this test, a victim could never recover for harm suffered as a result of a design hazard that was open or obvious or one with respect to which the purchaser was adequately informed. So, the test can result in finding products to be not defective that could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product;

(2) This test can result in the identification of products as being defectively dangerous that are clearly not, as when a new drug is a great boon to humanity but a few are victimized by a side effect or adverse reaction that was an unknowable risk;

(3) The meaning is ambiguous and the test is very difficult of application to discrete problems.

Id. at 698-99.

To respond to the inadequacies of the user-contemplation test for strict liability in tort, a different test developed, namely, the risk-utility test, that is, a product is defective as designed only if the magnitude of the risk or danger outweighs the utility of the product, when various factors are considered. See, *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410 (Colo. 1986); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983); *Rix v. General Motors Corp.*, ____ Mont. ____, 723 P.2d 195 (1986). See, further, Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) (confusing terminology employed in the user-contemplation test; factors to be considered in the risk-utility test); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579 (1980) (inadequacies of user-contemplation test); Uniform Product Liability Act § 104(B) (factors concerning an unreasonably unsafe design). In *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the Supreme Court of California adopted alternative tests for a manufacturer's strict liability in tort for a product's defective design, that is, the user-contemplation test or, if the plaintiff demonstrates that the product's design proximately caused injury, the defendant has the burden of proof to establish that the benefits of the challenged design outweigh the risk of danger inherent in such design.

Regarding products liability cases, Nebraska has yet to adopt the risk-utility test for strict liability in tort. Neither Rahmig nor Mosley suggests that such risk-utility test should be adopted to impose strict liability on a manufacturer of a defectively designed product. Whether Nebraska should or will adopt the risk-utility test for strict liability in tort is a matter for the future

in an appropriate case brought to this court. We mention the risk-utility test only to indicate the evolving law of products liability and to place in perspective Nebraska's present law concerning a manufacturer's strict liability in tort for a design defect.

STANDARD OF REVIEW: SUFFICIENCY OF EVIDENCE FOR VERDICT

In considering whether evidence in a civil case is sufficient to sustain findings necessary for a verdict, the Supreme Court does not reweigh evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing sufficiency of evidence to sustain a verdict, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a civil case must be sustained if the evidence, viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. See, *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985); *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985). Cf. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987) (Supreme Court's review of a conviction by verdict).

FACTUAL BASIS FOR VERDICT

Without repetitious reference to the facts already set forth in this opinion, the evidence is sufficient to support the jury's findings adverse to Mosley on the issue of strict liability for a design defect.

As a result of the Monster's design, it was foreseeable by Mosley that its product would be used by people such as Rahmig and that the cleaning procedure for the Monster would require personal presence of Rahmig in the Monster's cutting chamber or discharge chute. The risk from one's entry into the Monster's cutting chamber or discharge chute is beyond reasonable question or dispute in view of the Monster's dangerous condition or hazard—the sudden and unexpected

descent of the upper blade. Based on the Monster's history of operation at the scrap yard, workmen were justified in their reliance that the blade-arm of the Monster, with power on, would not unexpectedly descend—a fact admitted by Mosley. The Monster's design demanded that one who had entered the area of the shear point or discharge chute would seek some way to retain balance and, therefore, reach for some place on the Monster for support. It was further foreseeable, from an engineer's point of view, that a worker, in an effort to attain balance, would place a hand on the Monster's mechanical mandible, there to be injured by the unexpectedly descending blade. Dr. Paul's testimony graphically demonstrated practicable ways or feasible alternatives in which the Monster could have been made safer. As admitted by Mosley, the technology for those alternative safety systems was available when Mosley manufactured the Monster in 1979. Under the circumstances, the expense involved in incorporating those alternative safety devices was virtually nominal and posed no threat to the Monster's marketability. A case of strict liability in tort for design defect has been clearly established by Rahmig.

STATE OF THE ART

Concerning products liability actions, Neb. Rev. Stat. § 25-21,182 (Reissue 1985) states:

> In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

NEBRASKA EVIDENCE RULE 407: SUBSEQUENT REMEDIAL MEASURES

Mosley contends that exhibits 56 and 57, depicting the lockpin device incorporated into Mosley's scrap shears, and exhibit 16, the memorandum regarding placement of warning signs on Mosley's scrap shears, were evidence of subsequent remedial measures inadmissible under Nebraska Evid. R. 407

(Neb. Rev. Stat. § 27-407 (Reissue 1985)), which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.

Before adoption of the Nebraska Evidence Rules, prohibition against evidence concerning postaccident repairs or safety precautions was expressed in *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, 116 N.W. 494 (1908): "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." (Syllabus of the court.) "The testimony would naturally impel the jurors to believe the [defendant] had ascertained its fault and was endeavoring to repair its dereliction, hence without question it had admitted its negligence." *Id.* at 659, 116 N.W. at 495. See, also, *Lindley v. Wabash R. Co.*, 120 Neb. 195, 231 N.W. 812 (1930).

Regarding Fed. R. Evid. 407, the federal counterpart to Neb. Evid. R. 407, the advisory committee noted:

> The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

"The encouragement of remedial measures . . . is the principal reason for the rule excluding evidence that such measures were taken." McCormick on Evidence § 275 at 817 (E. Cleary 3d ed. 1984).

According to Weinstein, the more generally accepted ground for exclusion under Rule 407 "is the policy of encouraging people to take safety precautions." 2 J. Weinstein & M. Berger,

Weinstein's Evidence ¶ 407[02] at 407-11 (1986). See, also, 2 J. Wigmore, Evidence in Trials at Common Law § 283 (J. Chadbourn rev. 1979).

The reason for Fed. R. Evid. 407, expressed by McCormick, and the policy consideration for Fed. R. Evid. 407, noted by Weinstein, are equally applicable to Neb. Evid. R. 407.

Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event. Cf. *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332, 337 (5th Cir. 1980) (Federal Rules of Evidence " 'favor the admission of evidence rather than its exclusion if it has any probative value at all' ").

In a products liability case based on negligence and the duty to warn:

> A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.

Prosser and Keeton on the Law of Torts, *Products Liability* § 96 at 685 (5th ed. 1984).

> [A] manufacturer's duty to produce a safe product, with appropriate warnings and instructions when necessary, is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others. . . .
>
> . . . .
>
> . . . [T]he duty of the manufacturer to warn of latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those which are reasonably foreseeable.

Moran v. Faberge, 273 Md. 538, 543, 545, 332 A.2d 11, 15-16 (1975). See, also, NJI 11.04 (duty/failure to warn regarding a defective product); Restatement (Second) of Torts § 388 (1965).

Whether "state of the art" is applicable regarding claimed

negligence in failure to warn about a defective product, we need not presently decide. See Neb. Rev. Stat. § 25-21,180 (Reissue 1985) (products liability actions in which "state of the art" may apply). An appeal is disposed on the basis of the theory presented by the pleadings on which the case was tried in the district court. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). The record shows that Rahmig and Mosley conducted the trial of the negligence issue (failure to warn) with reference to "state of the art."

Mayne, as an adverse witness for Rahmig, testified that the Monster, when manufactured in 1979, conformed with the existing "state of the art," which included the ANSI standards concerning warning signs, namely, notice posted on a machine when a dangerous or hazardous defect existed in a machine. However, Mayne was unable to state that warning signs were on the Monster shipped to Scottsbluff Pipe & Supply. Without our deciding whether such intracompany memorandum was an admission by Mosley that all machines manufactured before March 27, 1981, were shipped without warning signs, including the Monster shipped to Scottsbluff Pipe & Supply, the memorandum tends to impeach Mayne and contradicts his testimony that the Monster in question conformed with the "state of the art"—a sign to warn an employee about the Monster's dangerous condition resulting from the design defect. Neb. Evid. R. 407 does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached. See, *Public Service Co. v. Bath Iron Works Corp.*, 773 F.2d 783 (7th Cir. 1985) (subsequent plans for product were admissible to contradict testimony that the product in question adequately conformed with prior successful design); *Runkle v. Burlington Northern*, 188 Mont. 286, 613 P.2d 982 (1980) (postaccident installation of an automatic flashing signal light contradicted testimony of railroad's expert who testified that a crossing was not extrahazardous); *Daggett v. Atchison, T. & S. F. Ry. Co.*, 48 Cal. 2d 655, 313 P.2d 557 (1957) (railroad's signal expert testified that a wigwag signal device, in use at the time of the

accident, was the safest type of automatic warning device; held, subsequent signal with flashing red lights was admissible for impeachment purposes). See, also, Annot., 74 A.L.R.3d 1001 (1976).

Consequently, the memorandum of March 27, 1981, was admissible under Neb. Evid. R. 407 to impeach Mayne and contradict his testimony that the Monster conformed with the state of the art.

In *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 128, 286 N.W.2d 257, 260 (1979), and referring to Neb. Evid. R. 407, this court stated: "Feasibility . . . means more than capable of being done. It includes effectiveness and practicality." Feasibility may also relate to physical possibility, ultimate utility, and success of intended performance. See *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983).

As noted earlier, regarding a cause of action against a manufacturer for strict liability in tort on account of a design defect: "[A] plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer." *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 614, 340 N.W.2d 369, 375 (1983). As also expressed in *Nerud*: "Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, [a plaintiff's] case in negligence based upon a defective design must fail." *Id.* at 613, 340 N.W.2d at 375. Therefore, Rahmig was required to prove a feasible substitute or practicable alternative as a safe design for the Monster in order to prevail on his strict liability claim against Mosley. Although the court in *Nerud* did not immediately and directly confront the evidential problem involving subsequent remedial measures and Neb. Evid. R. 407, such inevitable problem now confronts us in Rahmig's case. If Rahmig is required to prove a feasible alternative for a safer Monster, as required by *Nerud*, there is no better evidence of feasibility than the measures taken by Mosley after Rahmig's accident, namely, the lockpin device which Mosley found to be a practical solution for the hazardous problem with the sudden and unexpected descent of the Monster's upper blade. The exclusion sometimes warranted by Neb. Evid. R. 407 is, therefore,

subordinated to the type of proof required by *Nerud*, Nebraska's case law existing at the time of trial, lest Rahmig be prevented from proving requisite feasibility of a safer product and thereby risk an adverse directed verdict or forfeiture of a favorable verdict on account of such absence of proof. In view of *Nerud*, the same evidential requirement necessitates admissibility of subsequent remedial measures as proof for Rahmig's "theory" or cause of action based on Mosley's negligent design of the Monster.

Consequently, there was no error in admitting evidence regarding the Mosley matters which occurred after Rahmig's accident.

STANDARD OF REVIEW: DIRECTED VERDICT

A party against whom a motion to dismiss is directed is entitled to have all such party's relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. See, *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985); *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 346 N.W.2d 411 (1984). A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. *Foltz v. Northwestern Bell Tel. Co., supra*. Thus, in a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.

RAHMIG'S ASSUMPTION OF RISK

Mosley contends that, as a matter of law, Rahmig assumed the risk regarding the Monster's design defect and any hazard or danger consequent to such defect. Mosley also alludes to misuse of a product as a "corollary to assumption of risk." Brief for Appellant at 20.

Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect. See *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). Ordinarily, the question of assumption of risk is for the jury, but, where the evidence is such that only one reasonable

conclusion is permissible, namely, a risk was assumed, a court, as a matter of law, may properly direct a verdict on such question. See, *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978).

" ' "One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it." ' " *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 670, 345 N.W.2d 12, 15 (1984). See Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984) (" 'Knowledge of the risk is the watchword of assumption of risk' ").

In contrast with contributory negligence (fault or breach of a duty to exercise such care as an ordinary prudent person would have exercised under the same or similar circumstances), assumption of risk " 'involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care . . . .' " *Sandberg v. Hoogensen*, 201 Neb. 190, 197, 266 N.W.2d 745, 750 (1978), quoting *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). See *Utsumi v. City of Grand Island, supra*. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect. See 3 T. Travers, American Law of Products Liability 3d § 42:17 (1987). See, also, *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App. 1976). A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect. *Heil Co. v. Grant, supra*. Thus, misuse is not an aspect of assumption of risk. See *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970). See, also, *Reese v. Chicago, Burlington & Quincy R.R. Co.*, 5 Ill. App. 3d 450, 283 N.E.2d 517 (1972).

There is no evidence that Rahmig knew about the Monster's latent design defect which caused the upper blade to descend suddenly and unexpectedly. Without knowledge that the

Monster's hydraulic system was deficient and, therefore, without his appreciation of the danger consequent to that condition in the machine, Rahmig could not assume the risk from the Monster's particular design defect. As pointed out by Dr. Paul, it was certainly foreseeable that an employee unfamiliar with the "inner workings of a hydraulic system" would enter the Monster to remove sheared metal. Given the absence of warning about the defect and the history of the Monster's operation at the scrap yard, as related by Rahmig and his coemployees, there was justified expectation that, with the Monster's power running and its controls in the "up" position to secure the blade-arm in an elevated position, it was safe to enter the Monster's cutting chamber or discharge chute to remove sheared metal. Under the circumstances, Mosley was not entitled to a directed verdict that Rahmig had assumed the risk of the Monster's design defect.

RAHMIG'S CONTRIBUTORY NEGLIGENCE

Mosley claims that, as a matter of law, Rahmig was guilty of contributory negligence sufficient to bar recovery on his negligence claim. See Neb. Rev. Stat. § 25-21,185 (Reissue 1985) (contributory negligence; comparative negligence).

Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. See, *Utsumi v. City of Grand Island, supra; Garcia v. Howard, supra; Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966). If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury. See *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986).

However, contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action

based on strict liability for a defective and unreasonably dangerous product. See, *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973).

"One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 127, 403 N.W.2d 335, 339 (1987). "To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances." *Id.* at 126, 403 N.W.2d at 339.

Whether some type of tool or instrument should have been used to clean or remove the sheared metal from the cutting chamber or discharge chute, rather than personal entry into the Monster, at the best for Mosley was a question of fact for the jury on the issue of Rahmig's reasonable care under the circumstances (no defect known to Rahmig, the Monster's history of general operation, and absence of warning about the defect). Evidence in this case did not compel only one conclusion—Rahmig's contributory negligence, as a matter of law, which barred recovery. Therefore, the jury was required to decide whether Rahmig's conduct was reasonable under the circumstances, a factual question answered adversely to Mosley.

ORAL ADMONITION TO JURY

After the trial court's oral admonition to the jury regarding Rahmig's causes of action or theories for liability, Mosley did not object to or otherwise protest such admonition. We decline to consider alleged error regarding an issue never presented at trial and submitted for disposition by the trial court. See, *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987); *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

RECROSS-EXAMINATION OF LEE NAVORETTE

Mosley's counsel did not state the additional question which

he desired to ask Navorette, nor did counsel make an offer of proof indicating the line of questioning and information to be elicited in recross-examination of Navorette.

Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611 (Reissue 1985)) provides in part: "(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time . . . ."

In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal. See, *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Chicago Lumber Co. v. Gibson*, 179 Neb. 461, 138 N.W.2d 832 (1965).

Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony. See Neb. Evid. R. 103(1)(b) (Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1985)). See, also, *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 363 N.W.2d 148 (1985); *Morris v. Laaker*, 213 Neb. 868, 331 N.W.2d 807 (1983).

From the record presented, we are unable to fathom what question Mosley's counsel wished to ask or what area of inquiry would have been explored by any further questioning on recross-examination. The trial court committed no error in refusing to allow continuation of Mosley's recross-examination of Lee Navorette.

CONDUCT DURING JURY DELIBERATION

Mosley contends that the jury's apparent consideration of an attorney fee for Rahmig's counsel and possible tax consequences of an award to Rahmig necessitates setting aside the verdict.

Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to

> assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In *McDonald v. Pless*, 238 U.S. 264, 267-68, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), the U.S. Supreme Court, rejecting allegations of a quotient verdict, refused to set aside the verdict and stated:

> If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

In reference to Fed. R. Evid. 606(b), which is the pattern for Neb. Evid. R. 606(2), McCormick states:

> First [Rule 606(b) does] not equate with, or govern, grounds for a new trial, but merely govern[s] the competency of jurors to testify concerning the jury process. Second, in addition to jurors' thought processes, discussions, motives, beliefs, and mistakes, [Rule 606(b)

> excludes] irregular juror conduct in the jury room. Third, [Rule 606(b) does] not exclude juror testimony of extraneous prejudicial influences. Fourth, [Rule 606(b) does] not preclude testimony of others about their knowledge of jury misconduct.

McCormick on Evidence § 68 at 166-67 (E. Cleary 3d ed. 1984). Fed. R. Evid. 606(b) "does serve to protect in some measure the finality of verdicts, and it is this policy that has doubtless led to its survival." McCormick, *supra* at 166.

As expressed in 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 606[03] at 606-26 (1987):

> Rule 606(b) seeks to reach an accomodation [sic] between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in the individual case. It does so by drawing the dividing line between inquiry into the thought processes of the jurors on the one hand, and inquiry into the existence of conditions or the occurrence of events calculated to exert an improper influence on the verdict, on the other.

In Neb. Evid. R. 606(2), the important phrase is "extraneous prejudicial information," and within that phrase the crucial word is *extraneous*, which means "existing or originating outside or beyond : external in origin : coming from the outside . . . brought in, introduced, or added from an external source or point of origin." Webster's Third New International Dictionary, Unabridged 807 (1981).

In *Klein v. Wilson*, 167 Neb. 779, 94 N.W.2d 672 (1959), which was a negligence action regarding an automobile-truck accident, two jurors conducted experiments to ascertain the stopping distance of a vehicle and, during jury deliberations, informed the other jurors about the results of the experiments. In *Klein*, this court concluded that "the making of statements of fact by jurors which are not in evidence is error and is to be condemned." *Id.* at 788, 94 N.W.2d at 678. See *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (in an action against a wiring manufacturer, a juror conducted an experiment of his home's wiring and communicated the results to other jurors, contradicting evidence at trial; held: the juror's experiment was extraneous prejudicial information).

An attempt by juror affidavits to impeach a plaintiff's verdict (wrongful death of a minor) was reviewed in *Selders v. Armentrout*, 192 Neb. 291, 220 N.W.2d 222 (1974), where, during deliberations, members of the jury discussed life insurance on their minor children. This court rejected such affidavits and stated:

> The general rule is that affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict.

Id. at 294, 220 N.W.2d at 224.

Affidavits by two jurors, alleging impermissible punitive damages and a quotient verdict, were brought to the court's attention in *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983). Ruling that such affidavits could not be considered to impeach the verdict, the court observed: "[A] jury's verdict should not be open to searching the minds and motives of the jurors . . . ." 709 F.2d at 998 n.16.

Discretionary prejudgment interest was included in a jury's award of compensatory damages in *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985), but the court, relying on *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), affirmed the trial court's rejection of a juror's affidavit as an attempt to impeach the verdict. See, also, *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981) (during jury deliberations, a juror stated that defendant-employer should be "taught a lesson" in a wage and hour dispute; held: a juror's possible prejudices or improper motives were not "extraneous influences" and could not be used to impeach the verdict).

From the foregoing cases, it becomes clear that Neb. Evid. R. 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. However, it is just as clear that Neb. Evid. R. 606(2) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during

deliberations, which enter into the verdict.

The affidavits offered by Mosley related to an expression of a general opinion held by some jurors, based on common experience or knowledge, and perhaps even mistaken belief. The affidavits did not reflect "extraneous prejudicial information" entering into the verdict. The court properly excluded the jurors' affidavits offered to impeach the verdict for Rahmig.

EXCESSIVE VERDICT

A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law. See, *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978); *Johnson v. Schrepf*, 154 Neb. 317, 47 N.W.2d 853 (1951).

In view of all the evidence, we are unable to conclude that the verdict is excessive.

NERUD V. HAYBUSTER MFG., REVISITED

On account of its impact in the present case, we now reexamine *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

One reason for adopting strict liability in tort regarding products liability claims is exoneration of a claimant from what is frequently an insurmountable burden of proof.

Through Judge Tobriner, the Supreme Court of California stated in *Barker v. Lull Engineering, Co.*, 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978):

> [O]ne of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the "risk-benefit" standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer . . . .

Accord *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1985).

In his frequently-quoted article, *On the Nature of Strict Tort Liability for Products*, Professor John W. Wade observes:

> It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

44 Miss. L.J. 825, 826 (1973).

As previously pointed out, Nebraska still adheres to the user-contemplation test generally reflected in Restatement (Second) of Torts § 402 A (1965) and has not, as yet, adopted the risk-utility test, which among its factors includes feasibility. See Wade, *supra* at 837.

In *Nerud v. Haybuster Mfg.*, *supra*, to formulate a requirement that "a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," 215 Neb. at 614, 340 N.W.2d at 375, the court relied heavily on *Wilson v. Piper Aircraft Corporation*, 282 Or. 61, 577 P.2d 1322 (1978), a products liability case *based on strict liability* (design defect) rather than negligent design. As acknowledged in *Wilson v. Piper Aircraft Corporation, supra*, Oregon had adopted the risk-utility test for a manufacturer's strict liability in tort. Wilson claimed that Piper had incorporated a defectively designed carburetor as a component in its aircraft, namely, a carburetor not using fuel injection to prevent or protect against carburetor icing, and alleged an alternative safer design. In *Wilson*, the Supreme Court of Oregon stated:

> [T]he court should balance the utility of the risk against its magnitude in deciding whether to submit a design defect case to the jury. One of the factors to be weighed in making this determination is the manufacturer's ability to

eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. In other words, the court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. . . .

. . . .

. . . *It is not proper to submit such allegations* [feasible and safer design] to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product. It is part of the required proof that a design feature is a "defect" to present such evidence. . . .

. . . .

There is not, however, any evidence about what effect the substitution of a fuel injected engine in this airplane design would have had upon the airplane's cost, economy of operation, maintenance requirements, over-all performance, or safety in respects other than susceptibility to icing. . . .

. . . .

. . . [W]e hold that plaintiffs did not produce sufficient evidence that a reasonably prudent manufacturer who was aware of the risks of carburetor icing would not have designed this model of aircraft with a carbureted engine, or that substitution of a fuel injected engine was practicable.

(Emphasis supplied.) 282 Or. at 68-71, 577 P.2d at 1326-28.

However, in *Wilson, supra*, the Oregon Supreme Court made the further observation and statement:

As pointed out above, the court's task is to weigh the factors bearing on the utility and the magnitude of the risk and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. *Our holding should not be*

> *interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury.* There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable.

(Emphasis supplied.) 282 Or. at 71 n.5, 577 P.2d at 1328 n.5.

Even the court in *Wilson* acknowledged that in some cases, for instance, where danger from a product is relatively severe and the product has limited utility, a jury may find the manufacturer liable, although no safer design was feasible. Again, we are reminded that Nebraska has adopted the user-contemplation test of the Restatement (Second) of Torts § 402 A (1965), while Oregon has adopted the risk-utility test, with its various factors.

After criticizing the user-contemplation test, the Supreme Court of New Jersey, in *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), applied the risk-utility test, reviewed various aspects of a products liability claim based on strict liability for design defect, and stated:

> By implication, risk-utility analysis includes other factors such as the "state-of-the-art" at the time of the manufacture of the product. . . . The "state-of-the-art" refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed. . . .
>
> State-of-the-art relates to both components of the risk-utility equation . . . . Although the focus is on the product, our attention is drawn to the reasonableness of

> the manufacturer's conduct in placing the product on the market. . . . In that regard, the risk side of the equation may involve, among other factors, risks that the manufacturer knew or should have known would be posed by the product, as well as the adequacy of any warnings. The utility side generally will include an appraisal of the need for the product and available design alternatives. . . . As we proceed, as we must, on a case-by-case basis, risk-utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the public.
>
> . . . The ultimate burden of proving a defect is on the plaintiff, but the burden is on the defendant to prove that compliance with state-of-the-art, in conjunction with other relevant evidence, justifies placing a product on the market. Compliance with proof of state-of-the-art need not, as a matter of law, compel a judgment for a defendant. State-of-the-art evidence, together with other evidence relevant to risk-utility analysis, however, may support a judgment for a defendant. In brief, state-of-the-art evidence is relevant to, but not necessarily dispositive of, risk-utility analysis. That is, a product may embody the state-of-the-art and still fail to satisfy the risk-utility equation.
>
> The assessment of the utility of a design involves the consideration of available alternatives. If no alternatives are available, recourse to a unique design is more defensible. The existence of a safer and equally efficacious design, however, diminishes the justification for using a challenged design.
>
> . . . .
>
> . . . *To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it* [*is*] *not necessary for* [*a*] *plaintiff to prove the existence of alternative, safer designs.*

(Emphasis supplied.) 94 N.J. at 182-85, 463 A.2d at 305-06.

Other courts have concluded that proof of a feasible substitute or an alternative safe design is not part of a plaintiff's indispensable burden in a products liability action based on

design defect. See, *Seward v. Griffin*, 116 Ill. App. 3d 749, 766, 452 N.E.2d 558, 571 (1983) ("evidence of alternative design feasibility is relevant and admissible in a design defect case, but it is not an essential element of such case"); *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139, 1144 (5th Cir. 1978) ("specific proof of the economic and technical feasibility of alternative designs" is not required); *Siruta v. Hesston Corp.*, 232 Kan. 654, 667, 659 P.2d 799, 808 (1983) (a products liability plaintiff "may properly show the *feasibility* of a safer design"); *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1985) (in a design defect case, the plaintiff may introduce evidence of an alternate design to show feasibility).

A requirement that a plaintiff prove feasibility, as a part of the plaintiff's burden of proof in a case based on strict liability for design defect, weighs down the plaintiff with the onus to provide evidence of those matters which are usually within the knowledge of the manufacturer, and is restoration of the exact burden to be avoided by the doctrine of strict liability in tort for a product's design defect.

Of no small importance is § 25-21,182, which clearly and emphatically states that, if a product conforms with the "best technology reasonably available at the time," such condition or status "shall be a defense." Technology is characterized or defined as the "application of scientific knowledge to practical purposes in a particular field." Webster's Third New International Dictionary, Unabridged 2348 (1981). Noting the characterization or definition of "state of the art" contained in § 25-21,182, Professor Keeton has stated: " 'State of the art' is also frequently used to mean that which is feasible in light of the technology which existed at the time the product was designed. . . . This definition requires consideration of what was reasonably capable of being done technologically and economically to reduce the risk of hazard." Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579, 595 (1980).

To avoid nonsuit as the consequence of *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), a products liability plaintiff must prove feasibility or practicality of another safer design, although feasibility and practicality are components of

technology which may constitute a statutory defense to the plaintiff's claim. As the result of *Nerud*, the products liability plaintiff can succeed on a claim based on design defect if, and only if, such plaintiff presents the initial evidence concerning state of the art, a question which the Legislature has statutorily directed shall be raised by the defendant-manufacturer. Thus, the plaintiff must present evidence pertaining to a defense before the defendant evidentially presents such defense. We would assuredly find irony in a requirement that a plaintiff, seeking recovery on account of negligence, must present evidence to negative contributory negligence before the defendant's evidence properly injects such defense into the trial—or suffer nonsuit of the plaintiff's case. A similar irony exists as the result of the burden of proof imposed by *Nerud* on a products liability plaintiff who seeks to recover on account of a product's design defect.

Therefore, insofar as *Nerud v. Haybuster Mfg., supra* at 614, 340 N.W.2d at 375, requires that "a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," *Nerud v. Haybuster Mfg., supra*, is disapproved and overruled.

In further examination of *Nerud v. Haybuster Mfg.*, we note *Nerud's* additional language:

> In the proper application of a risk versus utility analysis to a negligent design case, one of the factors which must be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs. . . .
>
> . . . Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, [a plaintiff's] case in negligence based upon a defective design must fail.

Id. at 612-13, 340 N.W.2d at 375.

As a result of *Nerud*, in products liability cases there has been a fifth element added to the otherwise standard four elements of negligence, namely, the additional essential element of a feasible substitute product free from defect or a practical and reasonable alternative but safer design.

We also observe that, after *Nerud*, this court decided *Hilt*

Truck Line v. Pullman, Inc., 222 Neb. 65, 382 N.W.2d 310 (1986), where we reiterated that, in a products liability case based upon negligent design, "to establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages." *Id.* at 69, 382 N.W.2d at 313.

In cases other than products liability based on negligence, a plaintiff need only prove the basic four elements in a negligence case, namely, duty, breach of duty, proximate causation, and damages. See, *Ames Bank v. Hahn,* 205 Neb. 353, 287 N.W.2d 687 (1980) (attorney's alleged negligence in drafting a deed); *Floridia v. Farlee,* 201 Neb. 39, 266 N.W.2d 204 (1978) (automobile accident); *Wilbur v. Schweitzer Excavating Co.,* 181 Neb. 317, 148 N.W.2d 192 (1967) (excavator's alleged negligence in striking a buried gasline).

At the present, therefore, we find there is a five-element requirement to establish negligence in a products liability claim for defective design, while simultaneously other claims based on negligence are governed by the long-established requirements—duty, breach of that duty, proximate causation, and damages. Injecting a new requirement into a negligent design case, namely, the plaintiff's proof of a reasonable alternative design to avoid a dangerous product, obliterates a well-defined demarcation between negligence and strict liability in tort for design defect. Also, in cases for negligent design, where a plaintiff is required to prove an alternative and safer design or other feasible substitute for a manufacturer's product, evidence of feasibility in the form of the manufacturer's postaccident remedial measures, alterations, or precautions will provide classic evidence to establish the manufacturer's liability. Requiring a plaintiff to prove feasibility or a practicable alternative but safer product in a negligent design case unnecessarily invites perilous and unfairly prejudicial evidence of postaccident matters excludable under Neb. Evid. R. 407. The reason and policy consideration for Neb. Evid. R. 407 would be frustrated, if not totally annihilated. Therefore, we must also disapprove and overrule *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), insofar as feasibility or reasonable alternative design

must be proved by a plaintiff to prevail on a cause of action for negligent design in a products liability case.

In this manner, Nebraska's products liability law is harmonized with our previous decisions based on the user-contemplation test of Restatement (Second) of Torts § 402 A (1965), so that products liability claims may be proved by evidence admissible in accordance with Neb. Evid. R. 407.

AFFIRMED.

KRIVOSHA, C.J., and BOSLAUGH, J., concur in the result.

RAMONA M. DOBBINS, APPELLEE, V. WILLIS E. DOBBINS, APPELLANT.

411 N.W.2d 644

Filed September 11, 1987. No. 86-1107.

1. **Modification of Decree: Child Support.** Modification of child support is an issue entrusted to the sound discretion of the trial court.
2. _____: _____. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
3. _____: _____. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
4. _____: _____. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
5. _____: _____. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The respondent, Willis E. Dobbins, has appealed from the order of the district court increasing the amount of child support he must pay under the decree dissolving his marriage to Ramona M. Dobbins.

The original decree of dissolution was entered on June 29, 1982. The court granted custody of the parties' two daughters to Ramona. Pursuant to the parties' stipulation, Willis was ordered to pay child support of $150 per child per month.

On July 28, 1986, Ramona filed an application to modify the decree to increase the award of child support. She alleged that the increase was required in the best interests of the children due to material changes in the parties' circumstances since entry of the original decree. Specifically, she alleged that Willis had realized numerous increases in his earnings over the years, whereas her own income had remained the same or decreased. She also alleged that the parties' two daughters had grown in years and their needs increased, thereby increasing the financial demands on her.

On October 20, 1986, a hearing was had on the application to modify. Prior to receiving any evidence, the trial court stated that it would not hear any evidence regarding increased financial needs of the children and their mother due to the daughters' growth in years. This limitation was based on the trial court's reading of an unidentified opinion of this court. The evidence was thus restricted to that regarding the allegation of increased earnings to Willis.

After hearing the testimony of both Willis and Ramona, the trial court on October 27, 1986, increased Willis' child support obligations under the decree to $175 per child per month.

On appeal, Willis maintains there was not sufficient evidence of a material change of circumstances since the time of the original decree which would justify the increase in child support.

Modification of child support is an issue entrusted to the sound discretion of the trial court. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). Our review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. *Wilson, supra*. Our de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

It is also necessary to keep in mind that the paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children. *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification. *Graber v. Graber, supra*.

Previously, this court has held that a "material change in circumstances" is a concept which eludes precise, concise definition. *Wilson v. Wilson, supra*. There are certain factors, however, which the district court may consider in determining whether a material change has occurred or not. Among those factors are: changes in the financial position of the parent obligated to pay support; the needs of the children for whom support is paid; good or bad faith motive of the obligated parent in sustaining a reduction in income; and whether the change is temporary or permanent. *Wilson v. Wilson, supra*.

In a similar vein, this court in *Meyers v. Meyers*, 222 Neb. 370, 374, 383 N.W.2d 784, 787 (1986), stated: "The determination of whether such a change has occurred involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent."

Willis contends that the evidence here was insufficient to support a modification because the record is silent as to the needs of the minor children in question. In fact, there is no such

direct evidence in the record. Ramona responds that an inference of the children's increased needs arises from the fact that she is now unemployed, which was not the case when the stipulation and decree were entered.

The lack of direct evidence regarding the children's needs is due to the fact that the trial court refused to hear evidence regarding Ramona's allegation that her minor daughters' growth in years had resulted in an increase in their financial needs. Any evidence that Ramona had on this issue should not have been excluded.

In *Graber v. Graber, supra* at 819, 374 N.W.2d at 10, this court stated:

> Indeed, if the changes are of the type that necessarily were in the contemplation of the parties at the time the decree was entered, even though material, such changes do not, of themselves, justify a modification. For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, standing alone, is not sufficient to justify a modification of a decree of dissolution.

Subsequently, in *Wagner v. Wagner, supra*, we indicated that the above quoted language from *Graber* was an overstatement. The better view, as stated in *Wagner, supra* at 157, 396 N.W.2d at 283, is that "evidence of the increased age of children alone will not furnish a satisfactory basis for modification of child support *unless* accompanied by competent evidence of the actual increase in the cost of maintaining the children." (Emphasis supplied.)

In view of *Wagner*, an opinion released subsequent to the hearing of this case, the trial court committed plain error in refusing to permit evidence on this issue. See Neb. Rev. Stat. § 25-1919 (Reissue 1985).

Nevertheless, the evidence before the court was sufficient to show a material change of circumstances. Specifically, the evidence reflected that Willis' gross income had increased from $28,894.58 in 1982, when the decree was entered, to $32,544.41 in 1985. The evidence also showed that while Ramona was employed as a gas station attendant when the decree was

entered, she was unemployed at the time of the modification hearing and had been so since August of 1986. Her unemployment was due to a heart condition which had caused her problems for 14 years. She could not work at the time of the hearing because her physicians would not sign a work release. Ramona also testified that the child support she received under the decree was her only source of income.

While there is indeed no direct evidence of the children's increased financial needs, the existence of that circumstance can reasonably be inferred from the fact that Ramona no longer is able to supplement the child support paid by Willis with outside income to care for the children. If Ramona needed $300 per month to provide for the children when she had additional income, it is reasonable to infer that the children would need more money from their father when Ramona could no longer supplement that amount.

In view of Ramona's decreased earning ability and Willis' increased earnings, it cannot be said the trial court abused its discretion in increasing Willis' child support obligations as it did.

Willis also argues that the increase in his income was contemplated by the parties at the time of the decree. This contention is based on Ramona's testimony that at the time of the decree she was aware of his annual raises and contemplated that he would receive such raises in the future.

Willis contends that under *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), changes in circumstances within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify modification.

Graber was subsequently limited by our opinion in *Wagner v. Wagner*, 224 Neb. 155, 158, 396 N.W.2d 282, 284 (1986), wherein we stated that the rule regarding contemplated changes in circumstances is limited "to anticipated changes which were specifically noted on the record at the time."

The record before us does not indicate that Willis' increase in salary was noted on the record at the time the decree was entered. While Ramona may have then been aware that Willis' income would increase in the future, that was not a factor which

clearly entered into their efforts to reach the stipulation which was approved by the court in its decree.

Even assuming Ramona's testimony was sufficient to show that the parties had then contemplated the future increase of Willis' earnings, it is clear that Ramona's complete reduction in income was not expected by the parties. The change in Ramona's relative financial position justifies the increase in child support ordered, even disregarding the increase in Willis' income. The trial court did not abuse its discretion in granting Ramona's request for increased child support.

Finally, Ramona requests an award of attorney fees on appeal. Given the parties' relative financial positions and the fact that the amount in controversy involved a relatively small increase in Willis' obligations, Ramona is allowed $1,000 for the services of her attorney in this court.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL E. MODEROW, APPELLANT.

411 N.W.2d 647

Filed September 11, 1987. No. 87-010.

Licenses and Permits: Notice. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice should be sent to the last address of the licensee as shown by the files of the department.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The defendant, Russell E. Moderow, was fined $10 and costs for operating a motor vehicle while his operator's license was suspended, and his operator's license was suspended for 1 year. Upon appeal to the district court the judgment was affirmed.

Upon appeal to this court the defendant has set forth two assignments of error: (1) that the verdict is not sustained by sufficient evidence and (2) that he has been deprived of property without due process of law. Both assignments are based on the contention that the Department of Motor Vehicles (DMV) failed to give proper notice of the suspension because the notice was not mailed to his last known address.

The record shows the defendant was stopped for driving in excess of posted speed limits. When he was asked to produce his driver's license and failed to do so, the officer checked with the station and learned the defendant's license had been suspended. The defendant gave the officer a sales slip for the vehicle, which listed his address as Marquette, Nebraska.

When the DMV suspended the defendant's license, it mailed a notice to him which requested that he forward his operator's license, No. G08-266; license plates; and registration certificate to the department. The notice stated his operating privileges would be restored upon proof of financial responsibility. The notice was sent to Marquette, Nebraska, 68854, and was returned unclaimed. The DMV records also showed that the defendant's license had previously been revoked and reinstated on condition that proof of financial responsibility be maintained until July 5, 1988. The records contain a copy of a notice of cancellation of insurance sent to the DMV by the defendant's insurance company, which listed the defendant's driver's license number as E28-5964 and his address as Marquette, Nebraska. The abstract of the defendant's driving record, also in evidence, listed his address as 1022 W. Koenig, Grand Island, and his operator's license number as G08-266.

The issue is whether the notice from the DMV was sent to the defendant at his last known address. The statute provides that the notice shall be served by mailing by either registered or certified mail to "the last-known residence of such person or, if such address is unknown, to the last-known business address of

such person." Neb. Rev. Stat. § 39-669.28 (Reissue 1984).

The defendant argues the DMV incorrectly sent the notice to Marquette, Nebraska, the address listed on the notice of cancellation of insurance, which listed his driver's license number as E28-5964.

The State contends the judgment is supported by sufficient evidence because the discrepancy in the driver's license numbers was due to the fact that the defendant was issued a new driver's license on July 11, 1985, which was after he had received his insurance policy. The State contends the DMV had records of both numbers and properly notified the defendant that his new license was suspended because his insurance had been canceled. The State further contends that defendant's last known address was Marquette, Nebraska, because that was the address listed on the insurance company's notice of cancellation, sent 4 months after the defendant had received his second driver's license, and that notice was in the department's files.

State v. Garst, 175 Neb. 731, 123 N.W.2d 638 (1963), involved a similar issue. In *Garst* the defendant was convicted of driving while under suspension and contended on appeal that he had not received proper notice of the suspension. The record contained abstracts of court records involving violations of the law relating to the operation of motor vehicles, a letter notifying the defendant of suspension, and its return, unclaimed. The address which appeared on the abstract for conviction was the address to which the notice had been sent. The defendant testified his mother had told him she had received a letter from the State which she believed related to his license, and he had sent her his operator's license, but alleged he did not know what his mother then did with it. The license was on file with the State when the defendant was charged with driving on a suspended license.

We stated the record established the notice had been mailed to the defendant's last known address as shown by "such records in the Department of Motor Vehicles." *Garst, supra* at 736, 123 N.W.2d at 641. That address was the address shown on the certified copy of the abstract for conviction report. We held that the statute requiring notice to the last known address does not require that a driver receive actual notice, and the Director

of Motor Vehicles should rely on the last known residence as shown by "the files in his office." *Garst, supra* at 737, 123 N.W.2d at 642.

The statute does not require that notice of revocation or suspension of an operator's license be actually received, or that the person involved have actual knowledge of the suspension or revocation of his license. *State v. Garst, supra.* In this case the defendant knew or should have known that his license had been reinstated upon the condition that he maintain proof of financial responsibility until July 5, 1988. When he failed to maintain insurance coverage or otherwise furnish proof of financial responsibility, he knew that his license would be suspended again.

The Marquette, Nebraska, address that was shown on the "Financial Responsibility Notice of Cancellation or Termination," dated November 14, 1985, and sent to the department by Dairyland Insurance Company, was the most recent information in the files of the department as to the defendant's address. It was the "last known residence," and the mailing of the notice to that address by the department satisfied the requirements of the statute.

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissents.

STATE OF NEBRASKA EX REL. S.B., APPELLEE, V. JOHN DYBDALL, APPELLANT.

411 N.W.2d 649

Filed September 11, 1987. No. 87-240.

1. **Paternity: Appeal and Error.** A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
2. **Evidence: Appeal and Error.** The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Randall T. Smith, for appellant.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The defendant appeals the judgment of the district court for Lancaster County, which found him to be the father of D.A.B. and which ordered him to pay $75 per month in child support.

The sole assignment of error is that the trial court erred in concluding that the defendant is the father of the child. We affirm.

A jury was waived and the case was tried to the district court. The mother of the child, S.B., testified that she began dating the defendant in August of 1983 and continued to do so through March 1984. She further testified that during this time period she had sexual intercourse with the defendant and with no other males. The child was born on August 31, 1984, a full-term baby. K.B., the mother's father, testified that the defendant and his daughter were dating from August 1983 through March 1984 and that during that time she was not dating anyone else. Further corroboration of the defendant's paternity was provided by the blood testing results, which show that the odds are 48 to 1 in favor of the defendant's being the biological father of the child, which translates into a probability of paternity of 97.9 percent.

The defendant, on the other hand, testified that he did not date or have sexual intercourse with the mother until February of 1984. He also stated that he could not have dated her until then because he had both knees operated on between August and December of 1983 and had to wear full leg casts which required him to use crutches or a wheelchair. Although he stated that this surgery was performed at the VA hospital in Lincoln, no corroborative medical evidence was offered.

A paternity action is an action at law, and, when a jury has

been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. *Glass v. Harper*, 195 Neb. 724, 240 N.W.2d 48 (1976); *Stauffer v. Wilson*, 182 Neb. 129, 153 N.W.2d 454 (1967). Furthermore,

> [t]he credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence this court will review the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong.

Stauffer, supra at 131, 153 N.W.2d at 456.

With that in mind, suffice it to say that there was sufficient evidence to sustain a judgment against the defendant. Although the evidence conflicted over whether the defendant and the child's mother had sexual intercourse during the necessary time period, the court apparently believed the mother's version of the story. Her version was corroborated both by her father and by the blood tests. Although in his brief the defendant makes much ado about the mother's garbled and inconsistent testimony, she never wavered from her story that the defendant was the only man who could have fathered her child.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

JOHN A. TYLLE, APPELLANT, V. CYRIL ZOUCHA, DOING BUSINESS AS ZOUCHA AUCTION & REALTY COMPANY, APPELLEE.

412 N.W.2d 438

Filed September 18, 1987. No. 85-492.

1. **Real Estate: Brokers: Limitations of Actions: Negligence: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
2. **Constitutional Law: Statutes: Presumptions.** All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Douglas R. Milbourn of Tessendorf, Milbourn & Fehringer, P.C., for appellee.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for amicus curiae State of Nebraska.

Thomas J. Fitchett of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for amici curiae National Association of Realtors and Nebraska Realtors Association.

Richard L. Boucher, for amicus curiae Nebraska Dental Association.

David R. Buntain and Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for amici curiae Nebraska Medical Association, Nebraska Society of Certified Public Accountants, Nebraska Society of Architects, and Nebraska Society of Professional Engineers.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Platte County. Appellant, John A. Tylle, originally brought this suit in the

district court against the appellee, Cyril Zoucha, doing business as Zoucha Auction & Realty Company, alleging that the appellee negligently failed to sell land the two had contracted to sell by auction.

In the fall of 1980 the parties to this appeal contracted to sell by auction land the appellant owned. The terms provided that the sale would be "with reserve," i.e., a minimum price of $3,000 per acre. In the event the price was not obtained, Zoucha Auction & Realty Company was granted exclusive listing of the land until February 15, 1981. The land was not sold at the auction conducted by Zoucha, nor was it sold in a later auction conducted by another auctioneer. The appellant finally sold the property himself at a price of $2,500 per acre. Tylle filed suit against Zoucha for negligently failing to sell his property, alleging damages in the amount of $20,908.

On April 17, 1985, the defendant moved for summary judgment. The district court judge granted the motion for summary judgment on the basis that the suit against Zoucha was not brought within the applicable statute of limitations governing actions for professional negligence under Neb. Rev. Stat. § 25-222 (Reissue 1985). Zoucha was also granted his cross-claim for damages in the amount of $812.04. Tylle's motion for new trial was denied. This appeal was originally heard on January 28, 1987. A rehearing on the issue of the constitutionality of § 25-222 was ordered and took place on May 28, 1987.

Appellant assigns as error that the trial court incorrectly found that the appellee was a professional and therefore was to be afforded the protection of the professional negligence statute of limitations as set out in § 25-222. Appellant also contends that the trial court erred in granting the appellee's motion for summary judgment on the ground that the appellant's case was not brought within 2 years from the date of the damage caused by appellee's negligence and, finally, that the trial court erred in failing to grant appellant's motion for new trial. We reverse and remand.

Tylle's assignments of error basically revolve around the question of whether a real estate broker is a professional. From our investigation of the applicable case law we note that the

question of whether a real estate broker is a professional has never been specifically addressed by this court. Looking to the law of other states, although the issue can certainly not be said to have arisen often, several cases have explicitly held that real estate brokers are not professionals. The Michigan Supreme Court, in *Pennock v. Fuller*, 41 Mich. 153, 155, 2 N.W. 176, 177 (1879), stated:

> Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law.

Pennock was followed in a 1977 case from the Michigan Court of Appeals. In *Coats v Uhlmann*, 87 Mich. App. 385, 274 N.W.2d 792 (1978), the Michigan Court of Appeals stated that the state's malpractice statute of limitations included only licensed professionals as opposed to any licensed occupation, noting the *Pennock* decision. A 1912 Iowa Supreme Court decision, *Cummings v. Penn. Fire Ins. Co.*, 153 Iowa 579, 134 N.W. 79 (1912), citing *Pennock*, held that real estate brokers are not professionals.

The clear majority of judicial holdings that a real estate broker is not a professional are in cases involving interpretations of zoning law. In *Village of Riverside v. Kuhne*, 335 Ill. App. 547, 82 N.E.2d 500 (1948), the Illinois Appellate Court held that real estate brokers were not professionals as that term is defined for purposes of Illinois zoning laws. Citing the *Pennock* decision, the Illinois court stated: "Real estate brokerage is not claimed to be, and at any rate is not, a 'profession' within the meaning of that term as used in the zoning ordinance." 335 Ill. App. at 560, 82 N.E.2d at 506. See *City of Rockford v. Eisenstein*, 63 Ill. App. 2d 128, 211 N.E.2d 130 (1965).

The issue of whether a real estate broker is a professional has

been similarly addressed in other states, with the unanimous conclusion that real estate brokers are not professionals. *Hackett v. Gale*, 104 N.H. 90, 179 A.2d 451 (1962); *Hancock v. Concord*, 111 N.H. 413, 285 A.2d 791 (1971); *Seaman v. Zoning Board of Appeals of Holliston*, 340 Mass. 488, 165 N.E.2d 97 (1960); *Capman v. Long Beach Tp.*, 95 N.J. Super. 523, 231 A.2d 852 (1967); *Jones v. Robertson*, 79 Cal. App. 2d 813, 180 P.2d 929 (1947). Finally, in the case of *Dlugos v. Zoning Bd. of Appeals of Trumbull*, 36 Conn. Supp. 217, 416 A.2d 180 (1980), the Connecticut Superior Court stated: "A plethora of decisions from other jurisdictions clearly indicates that a real estate broker simply cannot be categorized as a professional person." 416 A.2d at 182. The weight of the case law is clearly against the appellee's claim that a real estate broker is a professional.

Zoucha urges upon us the definition of professional set out in the opinions of this court, the most recent of which is *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). There, we defined profession as an act or service arising out of a " 'vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.' " *Id.* at 229, 369 N.W.2d at 75. Appellee argues that real estate brokerage is an occupation which is predominantly mental or intellectual, as opposed to manual or physical. While we agree that this is true, we do not agree that this alone qualifies an occupation as being a profession. Appellee attempts to bolster his argument by citing to us Neb. Rev. Stat. § 21-2202 (Reissue 1983), the definition section of the Nebraska Professional Corporation Act, Neb. Rev. Stat. §§ 21-2201 to 21-2222 (Reissue 1983). Section 21-2202 states in pertinent part:

> As used in sections 21-2201 to 21-2222, unless the context otherwise requires:
>
> (1) Professional service shall mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which, except for the services of a real estate broker, prior to the passage of

> sections 21-2201 to 21-2222 and by reason of law could not be performed by a corporation, including, but not limited to, personal services rendered by a certified public accountant, public accountant, dentist, osteopath, physician and surgeon, veterinarian, real estate broker, associate real estate broker, real estate salesperson, or attorney at law; and for purposes of sections 21-2201 to 21-2222, those professions pertaining to the diagnosis, care, and treatment of humans shall be considered to be of the same profession.

Aside from the fact that the definition of professional services is explicitly limited to use in the Nebraska Professional Corporation Act, we find this definition to also be unacceptable, as a profession is far more than the mere possession of a license to ply one's trade. Webster's Third New International Dictionary, Unabridged 1811 (1981), defines profession as:

> 4 a : a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service . . . .

In our opinion, this language best defines a profession. The definition stresses the long and intensive program of preparation to practice one's chosen occupation traditionally associated only with professions. It does not stress the difference between manual and intellectual labor which, while a trademark of the traditional professions, would seem to exclude some occupations commonly considered to be professions even though manual or physical. This definition also does not rely on the mere possession of a license. To rely solely on the possession of a license distorts the definition, as it would include many occupations which were traditionally not considered to be professions simply because they were licensed.

For each of these reasons we hold that a real estate broker

cannot be considered to be a professional for the purpose of the professional negligence statute of limitations. By so finding, we need not address the remainder of the appellant's assignments of error. Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

On rehearing the appellant argued that the statute of limitations governing professional negligence no longer serves the purpose for which it was adopted, to prevent a crisis in the medical profession due to the rise of malpractice litigation. That need, argues the appellant, was later met by the Nebraska Hospital-Medical Liability Act. The appellant also argues that the statute is unconstitutionally vague as ordinary men are required to guess at the meaning of the word "professional."

We note that the constitutionality of § 25-222 has previously been upheld on several separate occasions. In *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), we upheld this statute against challenges that it was unconstitutionally vague. There, we stated: "The legislative purpose is clear and although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible." *Id.* at 586, 244 N.W.2d at 204-05. In *Colton v. Dewey*, 212 Neb.

126, 321 N.W.2d 913 (1982), we again upheld the constitutionality of this statute against the same challenges, finding that the appellant's assignments of error were meritless. Finally, in *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), this statute was upheld against a challenge based on the open courts doctrine. See *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987).

The unconstitutionality of a statute must be clearly established. All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984); *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987). As we have already passed on the issue of the constitutionality of this statute, we will not again go into an extended discussion of the constitutionality of § 25-222. We conclude by holding that the statute's presumption of validity has not been overcome.

We conclude that the district court judge incorrectly applied the professional negligence statute of limitations to this case and incorrectly granted the appellee's motion for summary judgment. We therefore reverse and remand for further proceedings consistent with these findings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., not participating.

CAPORALE, J., concurring.

I concur in the result reached by the majority, not because real estate brokers are not professionals, but because the meaning of the word "professional" is so nebulous that the phrase "professional negligence," as used in Neb. Rev. Stat. § 25-222 (Reissue 1985), has no real meaning. As a result, § 25-222 contains no classificatory scheme which the courts may constitutionally apply.

The term "profession" originally contemplated only theology, law, and medicine, but as applications of science and learning extended to other human endeavors, other vocations came to be designated as such, a designation which implied professed attainments in special knowledge as distinguished from mere skill; a practical dealing with affairs as distinguished

from mere study and investigation; and an application of such knowledge to uses for others, as a vocation, as distinguished from its pursuit for its own purposes. *United States v. Laws*, 163 U.S. 258, 16 S. Ct. 998, 41 L. Ed. 151 (1896) (holding that a chemist was one belonging to a recognized profession for purposes of an act controlling the employment of foreign nationals). Accordingly, in addition to the traditional professions of law, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), and medicine, *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), this court has applied the professional period of limitations contained in § 25-222 to architects and engineers, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); accountants, *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983); medical technicians, *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976); and, without discussion, to those giving investment advice, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974).

On the question of whether a real estate broker is a professional, the authorities are split. Generally, older cases and cases involving zoning regulations which allow "professionals" to maintain offices in their homes have found that a real estate broker is not such. *Jones v. Robertson*, 79 Cal. App. 2d 813, 180 P.2d 929 (1947); *Dlugos v. Zoning Bd. of Appeals of Trumbull*, 36 Conn. Supp. 217, 416 A.2d 180 (1980); *Village of Riverside v. Kuhne*, 335 Ill. App. 547, 82 N.E.2d 500 (1948); *Cummings v. Penn. Fire Ins. Co.*, 153 Iowa 579, 134 N.W. 79 (1912); *Seaman v. Zoning Board of Appeals of Holliston*, 340 Mass. 488, 165 N.E.2d 97 (1960); *Pennock v. Fuller*, 41 Mich. 153, 2 N.W. 176 (1879); *Coats v Uhlmann*, 87 Mich. App. 385, 274 N.W.2d 792 (1978) (citing *Pennock v. Fuller, supra*, in footnote); *Hancock v. Concord*, 111 N.H. 413, 285 A.2d 791 (1971); *Hackett v. Gale*, 104 N.H. 90, 179 A.2d 451 (1962); *Capman v. Long Beach Tp.*, 95 N.J. Super. 523, 231 A.2d 852 (1967).

More recent cases, however, have found real estate brokers to be professionals. *Speigner v. Howard*, 502 So. 2d 367 (Ala. 1987) (real estate brokers held to professional standards); *Bevins v. Ballard*, 655 P.2d 757, 763 (Alaska 1982) ("Real estate

brokers are licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally"); *Baker v. Leight*, 91 Ariz. 112, 117, 370 P.2d 268, 271 (1962) ("real estate profession"); *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (real estate brokers possess professional knowledge and have professional obligations and duties); *Stoltz v. Delaware Real Estate Com'n*, 473 A.2d 1258 (Del. Super. 1984) (real estate brokers subject to professional self-regulation); *Falovitch v. Adrienne Realty, Inc.*, 345 So. 2d 839, 841 (Fla. App. 1977) ("A real estate broker is a professional person employed to use his professional knowledge . . ."); *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983) (assumes, without deciding, that real estate brokers are professionals covered by the 2-year statute of limitations for professional malpractice); *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 61, 456 N.E.2d 281, 285 (1983) (defendant "is a professional real estate broker"); *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985); *Vislisel v. Bd. of Adjustment of Cedar Rapids*, 372 N.W.2d 316 (Iowa App. 1985) (in Iowa, realtors fall in the classification of professional persons; *Cummings v. Penn. Fire Ins. Co., supra*, thus no longer valid law in Iowa); *Mallet v. Maggio*, 503 So. 2d 37, 38 (La. App. 1986) ("A real estate broker is a trained professional"); *Evanoff v. Hall*, 310 Mich. 487, 17 N.W.2d 724 (1945) (language that real estate broker is employed professionally calls into question the validity of *Pennock v. Fuller, supra*); *Briggs v. Johnson*, 293 Minn. 49, 53, 196 N.W.2d 470, 472 (1972) ("professional real estate brokers"); *Johnson v. Brown*, 401 N.W.2d 85, 87 (Minn. App. 1987) ("professional real estate agent"); *McCarty v. Lincoln Green, Inc.*, ____ Mont. ____, ____, 620 P.2d 1221, 1225 (1980) ("real estate brokers' profession"); *N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Bds.*, 93 N.J. 470, 474, 461 A.2d 1112, 1114 (1983) ("realty and legal professions"); *Paris of Wayne v. Richard A. Hajjar Agency*, 174 N.J. Super. 310, 416 A.2d 436 (1980) (calling *Capman v. Long Beach Tp., supra*, into doubt because real estate agents found to be professionals); *People v. Bacon*, 133 Misc. 2d 771, 508 N.Y.S.2d 138 (1986) (zoning law includes real estate brokers as professionals); *Melgard v. Hanna*, 45 Or. App. 133, 607 P.2d 795 (1980)

(professional malpractice case against attorney and real estate broker); *Hamilton Bank v. Rulnick*, 327 Pa. Super. 133, 475 A.2d 134, 135 (1984) (" 'profession of a real estate broker' "); *O'Brien v. R-J Development Corp.*, 387 N.W.2d 521, 524 (S.D. 1986) (alleged violation of duties as "professional real estate agents"); *Hurney v. Locke*, 308 N.W.2d 764, 768 (S.D. 1981) ("A real estate agent is a licensed professional . . ."); *Hoffman v. Connall,* 108 Wash. 2d 69, 75, 736 P.2d 242, 245 (1987) ("no persuasive reason to hold real estate brokers to a higher standard of care than other professionals"); *Walter v. Moore*, 700 P.2d 1219 (Wyo. 1985) (real estate profession). Recent legal scholarship also supports the conclusion that real estate brokers are professionals. A. Gaudio, Real Estate Brokerage Law § 272 at 332 (1987) ("A broker is a licensed professional"); R. Kratovil & R. Werner, Real Estate Law § 8.04 at 91 (8th ed. 1983) ("Today's broker is a highly skilled professional with a great breadth of knowledge of real estate law"); *Mandatory Disclosure: The Key to Residential Real Estate Brokers' Conflicting Obligations*, 19 J. Marshall L. Rev. 201 (1985) (buyer hires real estate broker on a professional basis).

This court has also already described "a professional farm manager, real estate broker, and appraiser." *Overbeck v. Estate of Bock*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977). And as the majority acknowledges, real estate brokers are identified among those rendering professional services as defined in the Nebraska Professional Corporation Act, Neb. Rev. Stat. §§ 21-2201 et seq. (Reissue 1983). Thus, I must conclude that real estate brokers are professionals, whatever "professional" may mean.

It is clear that in everyday common parlance professional has come to mean something other than that contemplated by *United States v. Laws*, 163 U.S. 258, 16 S. Ct. 998, 41 L. Ed. 151 (1896), or as defined by Webster's Third New International Dictionary, or as recently defined by us in *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); that is, an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. People speak of

"professional bowlers," "professional musicians," "professional mechanics," "professional drivers," and the like. Our own statutes use the word "professional" in a variety of contexts to modify designated occupations, including a "professional artist or historian," Neb. Rev. Stat. § 14-2004 (Reissue 1983); "professional advisor," Neb. Rev. Stat. § 28-613 (Reissue 1985); "professional sport," Neb. Rev. Stat. § 28-614 (Reissue 1985); "professional assistants" from the Department of Roads, Neb. Rev. Stat. § 39-2107 (Reissue 1984); "professional investor," Neb. Rev. Stat. § 58-321 (Reissue 1984); "professional finders' fee," Neb. Rev. Stat. § 69-1317 (Reissue 1986); "professional counselors," Neb. Rev. Stat. §§ 71-102, 71-107, 71-110, 71-112, and 71-162 (Reissue 1986); "professional examiners," Neb. Rev. Stat. § 71-114 (Reissue 1986); "professional nursing," Neb. Rev. Stat. §§ 71-1,132.04, 71-1,132.06, 71-1,132.07, 71-1,132.11, 71-1,132.13, 71-1,132.16, 71-1,132.24, and 71-1,132.25 (Reissue 1986); "professional educators," Neb. Rev. Stat. § 79-332 (Reissue 1981); and, not least of all, "professional wrestling or boxing," Neb. Rev. Stat. §§ 81-8,129, 81-8,130.01, 81-8,132, 81-8,134, 81-8,135, 81-8,139, and 81-8,139.01 (Reissue 1981), and § 81-8,133.01 (Cum. Supp. 1986). In addition, other courts have described other occupations as professional, including an ambulance service, *Curtis Ambulance v. Shawnee Cty. Bd. of Cty. Com'rs*, 811 F.2d 1371 (10th Cir. 1987), and the installation of a computerized betting system at a racetrack, *Autotote Ltd. v. N. J. Sports & Expo. Auth.*, 85 N.J. 363, 427 A.2d 55 (1981).

Thus, professional, as commonly used today, really means nothing more than an activity by which one earns his or her livelihood. Since Neb. Rev. Stat. § 25-207 (Reissue 1985) provides a general 4-year period of limitations for tort actions, the word professional, as used in § 25-222, is ambiguous and therefore subject to interpretation, *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982), making necessary an examination of the legislative history, including the floor explanation or debate. *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983).

The introducer's statement of purpose identifies physicians,

surgeons, and medical personnel as needing legislative protection, Statement of Purpose, L.B. 1132, Judiciary Committee, 82d Leg., 2d Sess. (Jan. 17, 1972), and doctors were specifically mentioned in the floor debates. Floor Debate, L.B. 1132, 82d Leg., 2d Sess. (Feb. 25, 1972). Why it was thought necessary to enact § 25-222 to protect physicians and surgeons is not at all clear, for Neb. Rev. Stat. § 25-208 (Reissue 1985) then provided a 2-year period of limitations for "malpractice" actions, as it still does. Whatever problems there may be in defining "malpractice," see, *Interholzinger v. Estate of Dent,* 214 Neb. 264, 333 N.W.2d 895 (1983), and *Stansbery v. Schroeder, post* p. 492, 412 N.W.2d 447 (1987) (refer to negligence actions against lawyers as legal malpractice actions), to date the malpractice portion of § 25-208 has been applied only to medical doctors, *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), *Toman v. Creighton Memorial St. Josephs Hosp., Inc.*, 191 Neb. 751, 217 N.W.2d 484 (1974), *Acker v. Sorensen*, 183 Neb. 866, 165 N.W.2d 74 (1969), *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), and *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), and a lawyer, *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984) (applies both §§ 25-208 and 25-222 to lawyer failing to seasonably file an annexation document). During the Judiciary Committee hearings, architects were also mentioned as being within the scope of § 25-222. Judiciary Committee Hearing, L.B. 1132, 82d Leg., 2d Sess. (Jan. 17, 1972). In Senator Luedtke's words, the statute "would also cover the lawyers, the architects, *and everybody*." (Emphasis supplied.) *Id.* at 19.

Section 25-222 has been challenged as being unconstitutional in five cases.

In *Taylor v. Karrer, supra*, this court was asked to determine whether § 25-222 was unconstitutional special legislation in violation of Neb. Const. art. III, § 18, and as being unconstitutionally vague as applied to two medical doctors.

In finding "substantial reasons for legislative discrimination" in regard to professional negligence, the *Taylor* court said:

We have seen in recent years the growth of malpractice

> litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services. On the other hand, a victim of malpractice is frequently unaware of it, or deceived in regard to it, for long periods of time. Such a person's situation is different from that sustained by persons subjected to ordinary personal or property injury. The situation of professional people and of those to whom they render services is substantially different from the normal situation encountered in the rendering of ordinary services and injuries sustained thereby. Public policy dictates diverse legislation in regard to professional services.

196 Neb. at 586, 244 N.W.2d at 204. The court consequently found that the statute was not unconstitutional as special legislation.

Turning its attention to the challenge on grounds of vagueness, the *Taylor* court noted that an otherwise valid statute will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. The court held that § 25-222 was not unconstitutionally vague as applied, noting that

> [t]he legislative purpose is clear and although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible. Such questions are faced in regard to many statutes and on occasion require construction.

196 Neb. at 586, 244 N.W.2d at 204-05.

The statute was also upheld on a constitutional challenge of vagueness in a case involving architects and engineers. In *Horn v. Burns and Roe*, 536 F.2d 251 (8th Cir. 1976), a steamfitter, who was injured when a heavy steamline failed, sued the engineering and architectural firm which had designed and

prepared the plans and specifications for the power plant and an organization of engineers which had been retained to approve the materials used in the construction of the power plant. The defendant engineering and architectural firm, as well as the organization of engineers, filed motions to dismiss, asserting that the steamfitter's action was barred by § 25-222. The steamfitter asserted that § 25-222 was so vague and indefinite as to be incapable of application and that it therefore unconstitutionally deprived him of his substantive right of action against the defendants. The U.S. District Court for the District of Nebraska sustained the defendants' motions to dismiss, holding that the practice of both engineering and architecture was "professional" within the ambit of the statute of limitations and that the work which was the subject of the complaint was "professional" in nature.

On appeal to the U.S. Court of Appeals for the Eighth Circuit, the court observed:

> The Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice. [Citations omitted.] A noncriminal statute is not unconstitutionally vague, however, where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions. [Citations omitted.] A finding of vagueness will thus result only where "the exaction of obedience to a rule or standard * * * was so vague and indefinite as really to be no rule or standard at all * * *", *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S. Ct. 295, 297, 69 L. Ed. 589 (1925), or where the statute is written in such terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application * * *". *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). [Citations omitted.]

Horn, 536 F.2d at 254.

The court further stated at 255:

> The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. The terms "professional negligence" and "professional services" are utilized in this manner in Section 25-222. They are directed to acts of those engaged in occupations applying specialized knowledge and intellectual skills to the performance of their duties. *Swassing v. Baum*, 195 Neb. 651, 656, 240 N.W.2d 24, 27 (1976).

The court of appeals concluded that "[t]he ordinary meaning of 'professional negligence' and 'professional services' is thus not 'so vague and indefinite as really to be no rule or standard at all' and the statute cannot be said to be unconstitutional and void on its face." *Horn* at 256. The court of appeals affirmed the order of the district court sustaining the defendants' motions to dismiss, because "the statute was not shown to have been unconstitutionally applied to the architectural and engineering services involved in this case . . . ." *Id.*

The 10-year period of repose, also found in § 25-222 but not relevant to this appeal, was challenged on constitutional grounds as well. In *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), the 10-year period of repose was upheld as applied to a physician against challenges that it constituted unconstitutional special legislation, that the 10-year period violated the equal protection clause of the U.S. Constitution and due process clause of the Nebraska Constitution, and that it violated the open courts requirement of Neb. Const. art. I, § 13. The enactment of the 10-year period of repose was held to be a valid exercise of legislative power.

Two subsequent cases then followed *Colton v. Dewey, supra*. In *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), another claim that the 10-year statute of repose denied the right of access to the courts guaranteed by Neb. Const. art. I, § 13, was dismissed by reference to *Colton v. Dewey, supra*. The same claim of unconstitutionality again arose in *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987), where we stated our adherence to *Smith v. Dewey, supra*, and *Colton v. Dewey, supra*, and thus again rejected the

constitutional challenge to the 10-year period of repose.

Thus, from all the challenges against § 25-222, the imprecise meaning of the word "professional" has only been argued twice: first, in *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), where we found that the word was not vague as applied to doctors, and second, in *Horn v. Burns and Roe*, 536 F.2d 251 (8th Cir. 1976), where the federal court of appeals found § 25-222 to not be vague as applied to engineers and architects. The legislative history supports those results.

Although Senator Luedtke said § 25-222 applied to "everybody," the legislative history cannot reasonably be understood to have intended a 2-year statute of limitations for, as examples, professional bowlers, drivers, or wrestlers. If so, we would have a 2-year period of limitations for all negligence claims resulting from one's occupation and a 4-year period of limitations for other causes of action based on negligence. There is nothing in the legislative history which suggests such a result was intended.

Neb. Const. art. II, § 1, distributes the powers of government into three separate and coequal departments or branches and prohibits one branch from exercising any power belonging to another branch. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). Accord, *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628 (1982); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967). It has been specifically noted that the Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them any legislative power. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982); *C. R. T. Corp. v. Board of Equalization*, 172 Neb. 540, 110 N.W.2d 194 (1961).

The power of classification rests with the Legislature, not with the courts. Neb. Const. art. III, § 18; *McDonald v. Rentfrow*, 176 Neb. 796, 127 N.W.2d 480 (1964). Accord, *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980). See, also, *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 400 N.W.2d 229 (1987). The Legislature's failure to adequately define the class which is to be given the benefit of a shortened period of limitations imposes upon the courts the task of

determining what there is about various occupational activities, if anything, which justifies such preferential treatment. This attempted delegation of the Legislature's classificatory power to the courts offends Neb. Const. art. II, § 1.

Experience has demonstrated that this court's initial thought that it could preserve the Legislature's effort in enacting § 25-222 by making a case-by-case analysis of the occupational activities to which the statute applies, *Taylor v. Karrer, supra*, was overambitious. It is now clear that the Legislature's failure to articulate a meaningful classificatory scheme requires the courts to do more than engage in the judicial act of applying a legislatively defined classification to a particular set of facts.

SHANAHAN and GRANT, JJ., join in this concurrence.

LON WENDELL STANSBERY, APPELLANT AND CROSS-APPELLEE, V. DAVID T. SCHROEDER, APPELLEE AND CROSS-APPELLANT.

412 N.W.2d 447

Filed September 18, 1987. No. 85-703.

1. **Negligence: Attorney and Client: Proof.** As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
2. **Negligence: Attorney and Client: Proof: Guaranty.** In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Reversed and remanded with directions to dismiss.

Leroy P. Shuster, for appellant.

Marvin O. Kieckhafer of Kay and Kay, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

The plaintiff appeals from a verdict of $66,346.48 in his favor in a malpractice action against his former attorney. The defendant attorney also cross-appeals.

David T. Schroeder began representing Lon Wendell Stansbery in various legal matters in 1976 or 1977. In April of 1978, Stansbery began to serve some time in the Nebraska Penal and Correctional Complex for a driving while intoxicated conviction and gave Schroeder a durable power of attorney so Schroeder could handle Stansbery's affairs while he was in prison. Stansbery is an alcoholic, which Schroeder knew.

In August of 1979 Stansbery considered lending $110,000 to Albert and Judy Leisy so they could buy a trailer park from BCDJ Investments, Inc. As a part of that transaction, Stansbery was to receive a limited guaranty of the loan by Albert Leisy's mother. Schroeder was an officer, director, and majority shareholder of BCDJ at that time. During negotiations for the deal, Schroeder represented both BCDJ and Stansbery, as is evidenced by the bills he submitted to both.

Schroeder went out of town, and when he came back on October 17, 1979, he discovered that the loan had fallen through. He informed Stansbery of this and spoke to him about just lending BCDJ the money instead. On October 19 Schroeder borrowed $5,000 from Stansbery. Schroeder then presented Stansbery with some loan papers which Stansbery eventually rejected because he did not like the 10-percent interest or the 30-year term of the loan. After this, several more discussions were had about Stansbery's lending money to BCDJ, and Stansbery eventually agreed to a loan of $110,000 at 12 percent for a term of 10 years. The note was signed only by James R. Kohl as president of BCDJ. This $110,000 was applied to an outstanding loan BCDJ had with the Keith County Bank & Trust Company. Schroeder had personally guaranteed this loan with the bank.

As part of Stansbery's loan to BCDJ, Stansbery thought he was to receive a first mortgage on the trailer park BCDJ owned and a second mortgage on the Leisy ranch to secure the debt. He testified that he would not have agreed to loan the money with only the trailer park mortgage, or if he had known that the

Leisys were not involved, or if he could not look to Richard Dudden or the Kohls. However, there is nothing in the record to indicate that the Leisys ever had anything to do with the proposed loan to BCDJ, nor were guaranties of Dudden or the Kohls ever proposed. Stansbery had to know when he received the loan papers that there were no guaranties other than the execution of the note and mortgage by Kohl as president of BCDJ. In actuality, he received no mortgage on the Leisy ranch, and, except for a very small portion of the trailer park, his mortgage on that park was inferior to a $190,000 mortgage to the profit sharing retirement plan for Dudden Elevator, Inc. Both Schroeder and Stansbery thought that Stansbery was to receive a personal guaranty from Schroeder at that time, but a written document to that effect was never found. In any event, any personal guaranty was discharged in Schroeder's bankruptcy.

The mortgage and promissory note for the loan were prepared at Schroeder's office under his instructions. Stansbery and Schroeder discussed the loan arrangements several times. Schroeder testified that during the second or third conversation, when Schroeder brought the documents to Stansbery to sign, Schroeder told Stansbery that he could not represent Stansbery in this transaction and that Stansbery should go talk to another attorney. Stansbery testified that Schroeder only told him he could talk to another attorney if he wanted to, but gave him no reason why he should, and that Stansbery responded that one attorney was enough, that was all he could afford. Stansbery did admit he knew Schroeder was an officer and had an ownership interest in BCDJ.

Stansbery signed the documents, and BCDJ made regular payments on the loan from November 1979 until sometime in 1982. Subsequently, the loan went into default for nonpayment. The certified public accountant who testified for Stansbery stated that based on BCDJ's tax returns and statement of debt of the corporation, BCDJ had insufficient cash coming into the corporation to pay either the debts it owed or the real estate taxes on the property it owned at the time Stansbery made the loan to BCDJ.

Stansbery brought suit against Schroeder, and a jury trial

was had on the issue of Schroeder's negligence. Contrary to Schroeder's wishes, the jury was not given instructions regarding Stansbery's alleged contributory negligence or failure to mitigate damages. The jury found for Stansbery in the amount of $66,346.48.

The issues raised by Stansbery regarding the foregoing facts are whether the trial court erred (1) when it instructed the jury that it should not determine the amount of interest, if any, to which the successful party may be entitled, and (2) when it did not add accrued interest due on the promissory note to the amount of the jury's verdict. Schroeder, on cross-appeal, contends the trial court erred (1) in excluding evidence and failing to instruct the jury on the issue of Stansbery's contributory negligence, (2) in excluding evidence and failing to instruct the jury on the issue of Stansbery's failure to mitigate damages, and (3) in giving instruction No. 12 regarding the durable power of attorney. Both parties have raised one additional assignment of error each which does not deal with the above facts, so each will be addressed separately.

Stansbery's two assignments of error can be dealt with together—that is, whether Stansbery is entitled to recover as part of his damages the amount of accrued interest on the promissory note he obtained from BCDJ. We believe the trial court correctly ruled that he was not so entitled. However, in arriving at this conclusion it was necessary for us to make general inquiry into the area of proximate cause. Having done so, we note as plain error under Neb. Ct. R. of Prac. 9D(1)d (rev. 1986) that Stansbery did not prove that the loss of the unpaid principal or interest was proximately caused by Schroeder's negligence. Accordingly, that issue should never have been submitted to the jury, and we must reverse the judgment of the district court and order the cause dismissed.

In his brief Stansbery argues that he is entitled to the interest on the note as well as the balance of the unpaid principal which the jury awarded him. He then cites us to cases in which we determined that accrued interest on a promissory note was a proper element of damages. See, e.g., *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985); *Bank of Axtell v. Johnson*, 125 Neb. 154, 249 N.W. 302 (1933). Those cases were,

however, suits based on breach of contract—failure to pay a note—while this case is one based on negligence.

In a contracts case the proper measure of damages is an amount which will compensate the injured person for loss which a fulfillment of the contract would have prevented or breach of it has entailed. *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980). Thus, in an unpaid note case, one of the elements of damages is the amount of interest the aggrieved party would have obtained had the breach not occurred. In a negligence case, however, the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence. 25 C.J.S. *Damages* § 71 (1966). See R. Mallen & V. Levit, Legal Malpractice § 303 (2d ed. 1981). Thus, each of the plaintiff's allegations of negligence must be addressed in order to determine whether any evidence was presented from which it can be inferred that had the defendant not been negligent, Stansbery would have received either the balance of the unpaid principal, or the accrued interest on the note, or both.

Stansbery alleged that Schroeder breached his duty to Stansbery in the following manner: (1) that Schroeder negligently prepared the mortgage and note accompanying the loan; (2) that Schroeder negligently failed to advise Stansbery of the character of the documents; (3) that Schroeder negligently failed to get personal guaranties for the loan from the other shareholders of BCDJ; (4) that Schroeder negligently failed to fully and completely disclose his involvement in BCDJ to Stansbery; (5) that Schroeder negligently failed to obtain Stansbery's consent to Schroeder's conflicting representation of Stansbery and BCDJ; (6) that Schroeder negligently failed to withdraw his representation of either Stansbery or BCDJ, when Schroeder knew or should have known that such representation of both was adverse to the interest of the other; (7) that Schroeder negligently entered into business transactions which were in conflict with Stansbery's interest; and (8) that Schroeder negligently failed to follow Canon V, DR 5-101(A), 5-104(A), and 5-105(B) and (C), of the Code of Professional Responsibility.

In a malpractice action against an attorney for negligence,

we see no reason why the same general elements as are necessary in any other case based on negligence must not be alleged and proved; i.e., duty, breach of duty, proximate cause, and resulting damages. *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). The general rule regarding an attorney's duty to his or her client is that " 'the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. . . .' " *Ishmael v. Millington*, 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592, 593 (1966). See, also, *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). Specifically dealing with the issue of attorney malpractice is *Wooddy v. Mudd*, 258 Md. 234, 237, 265 A.2d 458, 460 (1970), which stated as follows: " 'In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.' . . ."

Allegations (1) and (2) can be dealt with summarily. The record reflects no evidence upon which a jury could find that Schroeder either had negligently prepared the mortgage and note or that he failed to advise Stansbery of the character of those documents. Thus, neither claim could have been the basis for the jury's verdict of the balance of the unpaid principal, let alone for interest.

Allegation (3), that Schroeder negligently failed to get personal guaranties for the loan from the other shareholders of BCDJ, presents more of a problem. Robert Coupland, one of Stansbery's expert witnesses, testified that Schroeder was negligent in failing to get the other shareholders to personally guarantee the loan. But assuming that the jury could have found that Schroeder breached his duty does not mean that Stansbery was automatically entitled to the unpaid principal and accrued interest on the money he loaned to BCDJ. Stansbery also had to present evidence that Schroeder's failure to obtain the personal guaranties proximately caused Stansbery's loss.

As we stated in *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 57 (1986): " ' "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." ' " In this case, the reason Stansbery could not collect on the note was because BCDJ and Schroeder both went bankrupt. Unless Stansbery could prove that the personal guaranties of the other shareholders would have prevented his loss, Schroeder's negligence in failing to obtain those guaranties was not the cause of Stansbery's loss. This Stansbery did not do. He presented no evidence with regard to the financial condition of the other shareholders. In the absence of any evidence that the guaranties of the other shareholders would have prevented his loss, Stansbery was not entitled to either the unpaid principal or accrued interest under this allegation of negligence.

Somewhat analogous to this situation is *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524 (Iowa 1983). This was a suit for attorney fees and a counterclaim for damages for legal malpractice arising out of a lawsuit which the attorneys had handled for Heasley against a third party. The jury, in returning a verdict for Heasley, determined the damages to be the amount of the judgment Heasley would have obtained against the third party but for the negligence of the attorneys.

The Iowa Supreme Court held that it was error to let the verdict stand because a party seeking damages in such a situation has the burden not only of proving the amount of the judgment he or she would have obtained, but, also, what amount could be collected. In doing so, the court stated at 526:

> Heasley did not introduce substantial evidence from which a jury could reasonably find that a judgment against Weavers would be collectible in full or in an ascertainable part. The jury was left to speculation except for contrary evidence Pickens introduced indicating that the Weavers were insolvent. A jury must be provided with facts affording a reasonable basis for ascertaining the loss.

Allegations (4) to (8) all deal with Schroeder's alleged

negligence in handling the conflict of interest that occurred when he represented both sides of this loan transaction. As stated in *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526-27, 50 Cal. Rptr. 592, 595-96 (1966):

> A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the three-way relationship when adversity of interest appears. Occasional statements sanction informed representation of divergent interest in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

See, also, *Crest Inv. Trust v. Comstock*, 23 Md. App. 280, 327 A.2d 891 (1974). The evidence reflects that Schroeder did not fully explain the problems with his dual representation to Stansbery. Stansbery's expert witness also testified that it was negligent for Schroeder to have continued to represent Stansbery given the facts in the case. Thus, there was sufficient evidence in the record to support a finding that Schroeder breached his duty to Stansbery. But, once again, breach of a duty is not enough. An attorney can only be civilly liable for losses to his or her client proximately caused by the breach of that duty.

In this case Stansbery never presented any evidence that had Schroeder fully disclosed his involvement with BCDJ, obtained Stansbery's consent to the dual representation, withdrawn from representation of Stansbery, not entered into business transactions which conflicted with Stansbery's interest, or followed Canon V, DR 5-101(A), 5-104(A), and 5-105(B) and (C), of the Code of Professional Responsibility, Stansbery would not have loaned BCDJ his money, or that BCDJ would not have defaulted on the loan. Without this necessary showing

of how Schroeder's conduct caused Stansbery's loss, there was nothing upon which the jury could base its verdict. Thus, we believe the verdict for the plaintiff in this case was improper and must be reversed. We thus do not need to address Schroeder's assignments of error on cross-appeal.

Stansbery has also assigned as error that the trial court erred in sustaining Schroeder's demurrer to the allegations of negligence contained in Stansbery's third amended petition regarding a school land lease deal. The third amended petition, filed on December 6, 1984, for the first time raised the issue of Schroeder's negligence regarding a school land lease of which Schroeder was to effect the renewal in the fall of 1981. On January 7, 1985, Schroeder filed a demurrer to the third amended petition, which demurrer was sustained on February 1, 1985, for the reason that the statute of limitations had run on that part of the pleading. On February 6, 1985, Stansbery filed an election to stand on his third amended petition. But then, on May 6, 1985, the court considered Stansbery's motion to amend his petition, which was granted instanter. Stansbery filed his fourth amended petition the same day. The portion dealing with the school land lease was not included in that petition. Schroeder answered on May 16, 1985, and trial was had on May 28 to 31.

Stansbery contends the court erred in sustaining Schroeder's demurrer because Stansbery had a continuing attorney/client relationship with Schroeder until 1983, which would have tolled the running of the statute of limitations on the school land lease issue. We need not address that issue in light of the fact that Stansbery elected to amend his third amended petition to leave out any reference to the school land lease issue. Had Stansbery wished to preserve that issue for appeal, he should not have filed a fourth amended petition which did not make any reference to that issue.

This then brings us to the last issue asserted by Schroeder on his cross-appeal, that being that the trial court erred in giving the supplemental instruction to the jury. The court instructed the jury that if it returned a verdict during the first 6 hours of deliberation, the verdict must be agreed to by all of the jurors, and if, after deliberating for 6 hours, the jurors were unable to

arrive at a unanimous verdict, 10 or 11 of the jurors could return a verdict. The instruction then stated that the case was submitted to the jury at 12:31 p.m., at which time the jury's deliberations were deemed to commence. But then at 6:35 p.m., the trial court gave a supplemental instruction to the jury, which stated that its deliberations had commenced upon the jurors' return from lunch at 2 p.m. It is this instruction that Schroeder contends was conflicting and prejudicial. In light of the fact that we have reversed the jury's verdict, it is not necessary to a determination of this case that we address that issue. However, we do make reference to *Keating v. Klemish*, 214 Neb. 458, 463-64, 334 N.W.2d 440, 443 (1983), in which this court stated:

> It is noted that in *Cartwright and Wilson Constr. Co. v. Smith*, 155 Neb. 431, 442, 52 N.W.2d 274, 281 (1952), it was held that the length of time devoted to meals "while the jurors are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time."

We therefore reverse the judgment of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JERI KAY OWEN, APPELLANT, V. WALTER OWEN, APPELLEE.
412 N.W.2d 82

Filed September 18, 1987. No. 85-820.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

George Rhodes, Custer County Attorney, for appellant.

Marsha E. Fangmeyer of Knapp, Mues, Beavers & Luther, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The petitioner, Jeri Kay Owen, appeals the order reducing the child support obligation of the respondent-appellee, Walter Owen. We have, as required in cases of this nature, reviewed the record de novo to determine whether the district court abused its discretion in rendering its order. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

We find no such abuse; accordingly, the judgment of the district court is affirmed.

AFFIRMED.

NOEL L. CHADD AND GLORIA J. CHADD, APPELLANTS, V. MIDWEST FRANCHISE CORP., A NEBRASKA CORPORATION, APPELLEE.

412 N.W.2d 453

Filed September 18, 1987. No. 85-840.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Contracts: Leases.** A lease is to be construed as any other contract.
4. **Contracts.** The proper construction of a written contract is generally a question of law to be determined by the courts.
5. _____. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable. Mutuality of obligation is an essential element of every enforceable agreement.
6. **Contracts: Leases.** Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
7. **Contracts.** Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
8. **Breach of Contract.** A party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.
9. _____. A condition is excused if the occurrence of the condition is prevented by

the party whose performance is dependent upon the condition.

10. **Contracts: Juries.** The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
11. _____: _____. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
12. **Breach of Contract.** An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.
13. _____. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
14. **Breach of Contract: Juries.** The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
15. **Breach of Contract: Damages.** As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

Louis Michael Thrasher, for appellants.

David A. Blagg and Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Noel L. and Gloria J. Chadd appeal from an order of the Douglas County District Court sustaining Midwest Franchise Corp.'s motion for summary judgment.

This case arises out of a contract dispute between the Chadds and the appellee, Midwest Franchise Corp., a Nebraska corporation. Evidence was received by the district court in support of and in opposition to a motion for summary judgment. Taking a version most favorable to the appellants, the facts appear to be as follows. After some preliminary negotiations the parties executed a document entitled "Lease Agreement" on May 9, 1979. Chadds agreed to lease their land and a building, to be constructed, to Midwest. The building was to be used as a Bonanza restaurant. Chadds were to erect a

building, or subcontract the construction, in accordance with plans and specifications provided by Midwest. Chadds were responsible for obtaining bids (including a bid by Chadds themselves) and submitting the same to Midwest for its approval.

The facts are in dispute as to the problems which arose after the lease agreement was executed. Apparently, Chadds were furnished with a standard Bonanza building floor plan, the B-76 plan, which originated from Bonanza International in Dallas, Texas. Midwest made a decision to alter the B-76 plan for the Nebraska area. At least in part, the dispute in this case involves difficulties surrounding the acquisition of final plans for the purpose of an accurate construction bid.

Noel Chadd alleges that he was unable to obtain a complete working set of drawings required for an accurate bid. He notified the principals of Midwest, Larry Miller and Charles Shada, of this problem on several occasions. Both Miller and Shada admit that there had been considerable problems in obtaining final plans from Midwest's architect. Shada, however, believed that Chadd eventually received a complete, final set of plans from the architect. Chadd alleges that he never received an acceptable set of plans and specifications.

Chadds solicited one bid from Belmont Construction Company based on incomplete plans. They did not advertise generally for the bids, nor submit a bid themselves, because they were waiting for a resolution to the problem with the drawings. The one bid which Chadds received was above the estimated cost of construction set forth in the lease agreement. However, that cost apparently could have been reduced if modifications were allowed, and that would not be known without a final set of plans.

On or about August 22, 1979, Noel Chadd received a letter from Midwest which indicated Midwest's desire to rescind the lease agreement. In addition, on August 15, 1979, Chadd was informed by another landowner, Bill Lesoing, that Midwest had been negotiating with Lesoing and that it had signed a contract with him. Apparently, Midwest had been negotiating the Bonanza construction project with two other landowners besides Chadds. All three parcels of land were in close

proximity.

Chadds concluded the agreement with Midwest was breached as of August 22, 1979. The evidence is ambiguous, at best, as to Midwest's intention when it sent the attempted rescission letter. Operating under the assumption that the agreement was not going to materialize, Chadds began to explore other options for their land. Eventually, the Chadds conveyed the land to other parties by executing a joint tenancy warranty deed on July 26, 1983.

The district court, following the words of Neb. Rev. Stat. § 25-1332 (Reissue 1985), found that there were no genuine issues of material fact and that Midwest was entitled to judgment as a matter of law. The court's order did not elaborate as to the basis for its decision. This court was compelled to search the record and examine every conceivable issue which might have been the deciding factor for the lower court's determination.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *In re Estate of Thompson*, 225 Neb. 643, 407 N.W.2d 738 (1987). The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Schrodt v. Sullivan Transfer & Storage Co.*, 222 Neb. 347, 383 N.W.2d 767 (1986). Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Id.* In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *In re Estate of Thompson, supra.*

The first issue that must be addressed in this action is whether there was an enforceable contract under which the appellants could recover. A lease is to be construed as any other contract. *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971). The proper construction of a written contract is generally a question of law to be determined by the courts. *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980).

Of particular concern in this action is whether, as a matter of law, paragraph 3 of the lease agreement negates the enforceability of the instrument. Paragraph 3 states in part:

> 3. CONSTRUCTION. Upon execution of this Lease, Owners [Chadds] shall proceed to obtain bids (including a bid by Owners) for the construction of the building in accordance with the attached plans and specifications which have been prepared and approved by Tenant [Midwest]. Upon Owners' acceptance and approval of a construction bid, *the same shall be submitted to Tenant for acceptance and approval.* It is estimated that the cost of the building will be between $240,000 and $260,000.

(Emphasis supplied.)

Approval or satisfaction clauses such as that found in the highlighted language above often give rise to arguments that the agreement is too vague or illusory. An agreement which depends on the wish, will, or pleasure of one of the parties is unenforceable. *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984). Mutuality of obligation is an essential element of every enforceable agreement. *Id.* In the present case the question becomes whether Midwest was required to accept or approve any bid at all if submitted by Chadds. In other words, Was Midwest's obligation to perform merely illusory?

Such satisfaction or approval clauses are generally held not to be too vague or illusory. The party to be satisfied must act in good faith or not unreasonably disapprove the subject matter. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant. See, *In re Wonderfair Stores, Inc. of Arizona*, 511 F.2d 1206 (9th Cir. 1975); *Mattei v. Hopper*, 51 Cal. 2d 119, 330 P.2d 625 (1958). The inference of good faith or reasonableness provides a

standard against which a party's performance is measured. Such "on approval" or "satisfaction" clauses are not used as a vehicle to defeat contracts. " ' "[S]uch contracts have been almost universally upheld.". . .' " *In re Wonderfair Stores, Inc. of Arizona, supra* at 1210. The bid approval clause in the case at bar does not invalidate the entire agreement.

Appellee contends that several conditions precedent exist, in this lease agreement, which were not performed by appellants. For this reason, appellee asserts, the agreement is not enforceable. It is true that where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed. *K & K Pharmacy v. Barta*, 222 Neb. 215, 382 N.W.2d 363 (1986). Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. *Brown v. Alron, Inc.*, 223 Neb. 1, 388 N.W.2d 67 (1986).

However, it is equally true that a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition. Additionally, if a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused. *Id.*

Midwest asserts that Chadds never submitted a bid as required, could not keep construction costs within the stated cost estimate, never attached a required addendum setting forth exact rental costs, and did not complete the building or deliver possession of such to Midwest for its acceptance. Chadds allege that these conditions precedent were not fulfilled because Midwest prevented or hindered Chadds from performing as required. Therein lies the basis for this court's conclusion that a summary judgment in this case was inappropriate. The record reflects a number of genuine issues of material fact.

There is evidence that Midwest or its architect delayed completion of finalized plans. The evidence is conflicting as to whether Chadds ever received final plans and specifications. Noel Chadd asserts that he could not generally advertise for

bids nor obtain an accurate bid due to inadequate drawings. In short, all of the unfulfilled conditions precedent asserted by Midwest were arguably contingent upon Chadds obtaining final plans. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury. 17A C.J.S. *Contracts* § 630 (1963). In addition, the questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury. *Id.*

Appellants further contend that they were unable to ever satisfy these conditions precedent due to the appellee's repudiation of the contract. The record indicates that Noel Chadd received a letter of desire to rescind from Midwest dated August 22, 1979. Chadd was informed on August 15, 1979, by another landowner that Midwest had signed an agreement to construct the planned Bonanza on that individual's land. There is some evidence that Chadd was told by one of the principals of Midwest, Larry Miller, that Midwest "wanted out" of the lease agreement.

An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979).

In a case such as this where one party (Chadds) has not fulfilled certain conditions precedent to the other party's (Midwest's) duty to perform, a special rule of law applies. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused. Restatement (Second) of Contracts § 255 (1981).

The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury. 17A C.J.S. *Contracts* § 630(e) (1963); 17 Am. Jur. 2d *Contracts* § 443 (1964); *Farwell Construction Co. v. Ticktin*, 84 Ill. App. 3d 791, 405 N.E.2d 1051 (1980). In this case, whether the words or acts of Midwest evinced an intention to refuse performance in the future is a genuine issue of material fact which cannot be disposed of by summary judgment.

Appellee has raised the issue of whether appellants can recover damages in this action. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach. *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985). Of particular importance to this appeal from a summary judgment, it should be noted that appellee has challenged appellants' version of the measure of damages. Where the measure of damages has been challenged by objections to the pleading or evidence, such objections require submission of the correct measure of damages to the jury if there is competent evidence to support it. *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964).

This court declines to determine the materiality of the facts or issues which bear on damages without a more complete trial record. The appropriateness of damages may be affected by parol evidence of subsequent modifications of the contract, and this court will not discuss such issues in the absence of proof.

The depositions, pleadings, and interrogatories offered to support and oppose the motion for summary judgment raise numerous factual disputes. Certainly the inferences to be drawn from these material facts are not clear. Midwest Franchise Corp. has failed to meet its burden of establishing conclusively the lack of any material issue of fact in this case. Accordingly, the judgment is reversed and the cause remanded for trial.

REVERSED AND REMANDED.

INDIAN HILLS COMMUNITY CHURCH, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

NEBRASKA CONFERENCE OF THE CHURCH OF THE BRETHREN, ALSO KNOWN AS THE ANTELOPE PARK CHURCH OF THE BRETHREN AND THE CHURCH OF THE BRETHREN OF NEBRASKA, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

412 N.W.2d 459

Filed September 18, 1987. Nos. 85-896, 85-897.

1. **Constitutional Law: Taxation: Statutes.** The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
2. **Constitutional Law: Legislature.** A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
3. **Constitutional Law: Taxation: Legislature.** Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
4. **Taxation: Presumptions.** Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction.
5. _____: _____. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
6. **Taxation: Proof.** The burden of proving exemption from taxation is on the party claiming such exemption.
7. **Taxation.** Under Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984), an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, a new application, before a previously granted exemption has expired. Failure to make reapplication for exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires.
8. **Taxation: Statutes.** Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete

and comprehensive act dealing with the matter of tax exemptions.

9. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Beverly Evans Grenier of Steven D. Burns, P.C., and Douglas W. Marolf, for appellants.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

In separate cases consolidated for appeal, Indian Hills Community Church and Nebraska Conference of the Church of the Brethren (appellants) appeal judgments of the district court for Lancaster County, affirming the Lancaster County Board of Equalization's actions by which real estate of the appellants was placed on the county tax rolls for 1984 on account of appellants' failure to file an application for tax exemption in accordance with Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984). We affirm.

Neb. Const. art. VIII, § 2, provides: "The Legislature by general law may exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

Neb. Rev. Stat. § 77-202(1) (Cum. Supp. 1984) provides:

> The following property shall be exempt from taxes:
>
> . . . .
>
> (c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used

for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.

Neb. Rev. Stat. § 77-202.01 (Reissue 1981) states:

> Any person, corporation, or organization seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of sections 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner. Any person, corporation, or organization seeking tax exempt status for any tangible personal property except motor vehicles shall apply for exemption to the county assessor by January 1, 1970. The county assessor shall examine the application and recommend either taxable or exempt status for the real property or tangible personal property except motor vehicles to the county board of equalization by February 1 following.

Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984) states in part:

> (1) When real or tangible personal property except motor vehicles has been exempted from taxation as provided by sections 77-202.01 to 77-202.07, *it shall continue to be exempt for a period of four years* from January 1 of the year following adoption of sections 77-202.01 to 77-202.07; *Provided*, that each owner of real or tangible personal property except motor vehicles so exempt shall file an affidavit with the county assessor by January 1 of each intervening year certifying that the use of each exempted real or tangible personal property except motor vehicles has not changed during the year. *On or before the expiration of such exemption, a new application shall be filed on which the procedure shall be the same as provided for other applications under the provisions of sections 77-202.01 to 77-202.07. If any person, corporation, or organization shall seek a new tax exemption for any real or tangible personal property except motor vehicles in any year, he, she, or it shall apply on or before September 15 of the year of application* as

> provided in section 77-202.01 and procedure thereon shall be the same as provided for other applications under the provisions of sections 77-202.01 to 77-202.07 . . . .

(Emphasis supplied.) (We note that § 77-202.01 was amended in 1984 and 1986 and § 77-202.03 was amended in 1986, but such amendments do not affect disposition of the present appeals.)

The parties stipulated facts relative to appellants' claims for tax-exempt property. Each of the appellants owns real estate in Lancaster County, and each filed an "Exemption Application" for the tax year 1980 pursuant to § 77-202.01, claiming exempt status under § 77-202(1)(c) (religious purposes). Appellants' property was exempted from taxation in 1980, and such exemption continued in 1981, 1982, and 1983, when appellants, as required by § 77-202.03, filed an "Affidavit of Use for Continued Tax Exemption" for each of those years after 1980. Without statutory authority or obligation to do so, in November of 1983 the county assessor's office mailed to each appellant a form application for exemption of property from taxation in 1984. That form had been completed by the county assessor, except that part of the application pertaining to a description of the property's use and the signature of the person authorized to sign on behalf of the applicant. Accompanying the exemption application was an explanatory letter from the assessor, reciting the mandatory filing requirement to retain tax-exempt status. Before September 15 in each year prior to 1984, the county sent a second notice to organization-taxpayers which had failed to file an application for exemption, but such practice was discontinued in 1984. Appellants failed to file an exemption application by September 15, 1984, as required by § 77-202.03. On November 19, 1984, the county clerk, on behalf of the board of equalization, mailed a letter to each appellant, informing appellants regarding a prospective hearing before the board concerning requested tax exemptions as well as appellants' failure to file an application for exemption and the county assessor's recommendation that appellants' property be returned to the tax rolls for 1984. At the hearing before the county board of equalization on December 11, 1984, appellants adduced testimony that the 1984 use of

appellants' property was the same as existed in 1980 through 1983, namely, religious purposes. On January 15, 1985, the board of equalization denied tax exemption for each appellant's property, which was then returned to the tax rolls for 1984. Included in each stipulation is the statement:

> [Appellant's] use of the property in question was the same for the tax year 1984 as it was in the previous years. The [appellant's] property is property which otherwise would 'be exempt from taxes' pursuant to Neb. Rev. Stat. §77-202(c) [sic] had the proper filings been made to acquire such exemption.

For 1984, the board of equalization returned previously exempt property of three other organizations (Lincoln Hospital Association, Way of Holiness Church, and Kramer Community Cemetery) to the tax rolls because those organizations failed to file an application for tax exemption authorized under § 77-202(1)(c).

In the district court, appellants asserted that the county board of equalization's action is "contrary to the laws of the United States [and the] State of Nebraska." The district court found appellants had failed to prove entitlement to tax-exempt status for their property because appellants did not file the application required by § 77-202.03. Also, the district court found that the board of equalization's "decision placing [appellants'] property on the tax rolls for Lancaster County for the tax year 1984 is not in violation of the Constitution of the United States or the State of Nebraska."

Appellants' first assignment of error is, in substance, the contention that the parties' stipulation contains the concession, and, therefore, the admission, that appellants' property, through unaltered use (religious purposes) from 1980 through 1983, is exempt from taxation, notwithstanding absence of the application for tax-exempt status of appellants' property. We do not construe the stipulation to the effect suggested by appellants. The stipulation simply acknowledges that appellants' use of real estate has remained the same since grant of the exemption in 1980 and that such use would qualify appellants' property for exemption under § 77-202(1)(c), if the proper document, namely, an application for exemption, had

been filed as required by law. Appellants' first assignment of error is without merit.

Appellants next claim that the district court erred in finding that the board of equalization's action did not violate the establishment and free-exercise clauses of the first amendment to the U.S. Constitution. While appellants do not contend that it is unconstitutional to tax property owned by a religious organization, appellants do argue that denial of tax-exempt status for property owned by a religious organization which has not filed the proper application for tax exemption affords preferential treatment for those religious organizations which file applications to exempt their property from taxation. To support their argument, appellants rely on *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), where the U.S. Supreme Court held that a New York statute allowing tax exemption to churches was not unconstitutional as an attempt to establish, sponsor, or support religion or as an interference with the free exercise of religion. Although the *Walz* Court, quoting from *Gibbons v. District of Columbia*, 116 U.S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886), did recognize that " '[i]n the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation . . . ,' " 397 U.S. at 679, nothing in *Walz* supports a premise or conclusion that the first amendment to the U.S. Constitution prohibits a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation.

In *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982), the U.S. Supreme Court held that a Minnesota statute imposing registration and reporting requirements on religious organizations that solicit more than 50 percent of their funds from nonmembers discriminated against such organizations in violation of the establishment clause of the first amendment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. However, the *Larson* Court noted:

> We agree with the Court of Appeals that appellees and others claiming the benefits of the religious-organization exemption should not automatically enjoy those benefits. . . . Rather, in order to receive them, appellees may be required by the State to prove that the Unification Church is a religious organization within the meaning of the Act.

Id. at 255 n.30. Thus, the U.S. Supreme Court has recognized that states may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.

The Nebraska Constitution does not extend an automatic tax exemption to property of a religious organization. "The Legislature by general law *may* exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes . . . ." (Emphasis supplied.) Neb. Const. art. VIII, § 2.

A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision. See, *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950); *State, ex rel. Walker, v. Board of Commissioners*, 141 Neb. 172, 3 N.W.2d 196 (1942); 16 C.J.S. *Constitutional Law* § 46 (1984). Some illustrative provisions of the Nebraska Constitution which are self-executing and, therefore, which require no legislative implementation are art. I, § 21 (just compensation required for private property taken or damaged for public use), see *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); art. I, § 13 (access to courts of Nebraska; remedy and justice without denial or delay), see *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952); and art. VIII, § 3 (redemption from sales for nonpayment of real estate taxes), see *County of Lancaster v. Schwarz*, 153 Neb. 472, 45 N.W.2d 432 (1950). The Nebraska Constitution also contains provisions which are not self-executing and, consequently,

require legislation to carry such provisions into effect; for example, art. V, § 22 ("The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought"), see *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985); and art. VIII, § 1 ("The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct"), see *Laub v. Furnas County*, 104 Neb. 402, 177 N.W. 749 (1920). Therefore, we hold that Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.

This is the first opportunity for this court to address the question whether property of a religious organization may be denied tax-exempt status as a result of the owner's failure to file an application for exemption. However, the general law regarding application of tax-exemption statutes is clear. "Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction." *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 889, 381 N.W.2d 166, 169 (1986). An exemption from taxation is never presumed. *North Platte Lodge, B. P. O. E., v. Board of Equalization*, 125 Neb. 841, 252 N.W. 313 (1934). "Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation." *Bethphage Com. Servs. v. County Board, supra* at 889, 381 N.W.2d at 169. See, also, *Iota Benefit Assn. v. County of Douglas*, 165 Neb. 330, 85 N.W.2d 726 (1957). The burden of proving exemption from taxation is on the party claiming such exemption. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

Section 77-202.03, which is the statute governing the questions involved in the cases now under review and which specified the duration of a tax exemption for the property of the appellants, in substance provided that, if property is exempted from taxation in any given year, such exemption may continue for each of the 3 successive years after grant of such exemption if the property owner annually and timely files the specified

affidavit. To obtain an additional tax exemption on expiration of the 4-year exemption but before September 15 in the year of a subsequent application, an owner must file a new application and must again show that the property qualifies for the exemption from taxation, for example, property used exclusively for religious purposes. See § 77-202(1)(c). Cf. *Potts v. Board of Equalization*, 213 Neb. 37, 328 N.W.2d 175 (1982). We hold that, under § 77-202.03, an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, "a new application," before a previously granted exemption has expired. Failure to make reapplication for exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires. Courts in other jurisdictions have reached the same conclusion in their construction of tax-exemption statutes similar to § 77-202.03. See, *Highland Church of Christ v. Powell*, 644 S.W.2d 177 (Tex. App. 1982); *Catholic Institute of Pittsburgh, Pa. v. Board of Property Assessment, Appeals and Review*, 55 Pa. Commw. 545, 423 A.2d 1114 (1980).

In their next assignment of error, appellants maintain that the mandatory language of § 77-202(1)(c) controls the procedural requirements, namely, application for tax exemption, prescribed in §§ 77-202.01 and 77-202.03. We have recognized that the provisions of Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are " 'clear and comprehensive' " and " 'constitute a complete and comprehensive act dealing with the matter of tax exemptions. . . .' " *Campus Lt. Hse. Min. v. Buffalo Cty. Bd. of Equal.*, 225 Neb. 271, 274, 404 N.W.2d 46, 48 (1987). "As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." *Wounded Shield v. Gunter*, 225 Neb. 327, 333, 405 N.W.2d 9, 13 (1987). See, also, *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985). In construing the statutes concerning the tax exemption involved in these appeals, we are not restricted to tunnel vision focused on one statute isolated from its related

statutory companions. Rather, we read the various sections of the tax-exemption statutes in conjunction with, and in the light of, one another. The Legislature has provided a full and complete procedure for those organizations seeking a tax exemption for their property. Because a tax exemption such as that involved in the present appeals is not constitutionally required, but is a matter of legislative grace, we decline to hold that the exemption specified in § 77-202(1)(c) pertaining to property of religious organizations is automatic and uncontrolled by the procedural requirements of §§ 77-202.01 and 77-202.03.

Next, appellants contend that the county's belated publication of a list of tax-exempt real estate, that is, a publication on October 24, 1984, rather than publication during September of that year, see § 77-202.03(2), and the county's failure to prepare a tax list "into a suitable book," see Neb. Rev. Stat. § 77-1613 (Reissue 1986), operate as a dispensation from compliance with the application requirement found in §§ 77-202.01 and 77-202.03. Whatever may be the consequences of the county's tardy publication or shortcoming in the transcription of assessments, revitalization of appellants' expired tax exemption is not among them. Appellants' contention about tax lists has no merit.

In their penultimate assignment of error, appellants maintain that the county board's action in returning appellants' property to the tax rolls is a contravention of Neb. Rev. Stat. § 77-1734.01 (Reissue 1986), which states in part:

> (1) In case of payment made of any taxes as a result of a clerical error on the part of taxing officials of the state, county, or other political subdivision of the state, or any taxpayer, the county treasurer is authorized to refund that portion of the tax paid as a result of the clerical error upon verification by the county assessor or other taxing official that such error has been made and upon approval by the county board.

Appellants characterize their failure to file the application for exemption as a "clerical error." However, § 77-1734.01 relates to a situation where a tax or part of a tax has been paid "as a result of the clerical error." Appellants have paid no tax;

hence, § 77-1734.01 is inapplicable in the present cases. See *School Dist. of Minatare v. County of Scotts Bluff*, 189 Neb. 395, 401, 202 N.W.2d 825, 829 (1972): "The only requirement of the statute [§ 77-1734.01] is that some portion of the tax was paid as a result of the 'clerical error.' " Section 77-1734.01 does not exonerate appellants from the application required by §§ 77-202.01 and 77-202.03. We leave to the Legislature whether an organization may be absolved from failure to file an application to exempt its property from taxation. Presently, Nebraska statutes provide no such excuse for failure to file the application for exemption required under §§ 77-202.01 and 77-202.03.

Finally, regarding the county board of equalization's disposition of appellants' claimed exemption, appellants assert that their treatment received differs from the otherwise favorable treatment given to other organizations which failed to file an application for tax exemption. The record does not reflect a shadow of substance for such assertion, which we, therefore, dismiss accordingly.

Appellants have assigned other errors attributable to the district court but have not discussed such assignments of error in their brief. To be considered by this court, errors must be assigned and discussed in the brief claiming that prejudicial error has occurred. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

The judgments of the district court affirming the action of the board of equalization of Lancaster County, that is, placing appellants' property on the tax rolls for the year 1984, are affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

LINDA BAY, APPELLANT, V. JOHN J. HOUSE, APPELLEE.

412 N.W.2d 466

Filed September 18, 1987. No. 85-952.

1. **Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Paul Korslund of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

Alan L. Plessman, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Appellant, Linda Bay, received a $10,000 judgment against appellee, John J. House, for personal injuries from an auto accident. Bay appeals, claiming inadequate damages and assigning these errors: (1) The jury verdict was wholly inadequate and contrary to the evidence on damages, and (2) the court erred in excluding medical testimony bearing on her damages. We affirm.

During the evening hours of Thursday, June 24, 1982, Bay was driving north in her car on a paved highway. House was driving south on the same highway; he drove his van across the median into Bay's path. The vehicles did not collide. In avoiding a collision, Bay believed that she bumped her left knee on the car instrument panel, sustaining an injury. At that time, Bay was married, was the mother of two children ages 5 and 10

years, and was employed 20 hours a week at K-Mart at $3.90 per hour, performing duties that required some heavy lifting.

A brief summary of some medical facts shows that after the accident she drove her car home; she waited until Saturday, June 26, before going to the emergency room in a Lincoln, Nebraska, hospital, where she was told she had a hamstring pull. On Monday she returned to work for about 3 weeks until her family doctor referred her to Dr. David Heiser, an orthopedic surgeon, who diagnosed her injury as a knee contusion and recommended a set of exercises, telling her she could return to work on November 16, 1982. She was next referred to Dr. Frederick Hathaway, an orthopedic surgeon, who performed arthroscopic surgery on November 15, 1982, with the diagnosis that both surfaces of the kneecap were injured. In December 1982, Bay fell at her home when her knee "gave out." She worked from January through March 1983. In September 1983, Dr. Hathaway performed the second surgery on her knee, when a screw was inserted in the knee, moving the patellar tendon medially to relieve pressure.

Bay returned to work in January 1984, for about 2 months. She was examined by Dr. William Fulcher, an orthopedic surgeon, on February 1, 1984. Trial began in October 1985.

EXCLUSION OF MEDICAL TESTIMONY

The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987). "[T]o obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown." *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 450, 406 N.W.2d 337, 343 (1987).

The excluded evidence relates to the depositions of both Dr. Hathaway, the treating doctor, and Dr. Fulcher, a consulting doctor.

Dr. Hathaway earlier stated that he was unable "to make any kind of estimate as to future medical expenses." Following that, his excluded testimony was that he anticipated that Bay would have future expenses and that it was possible Bay would need further medication and therapy for pain and discomfort in her knee. Appellee's objection to these opinions on the bases of

speculation and no foundation was sustained. Dr. Fulcher's excluded opinions were that it was possible that a person with Bay's knee injury could have a temporary weakness in her leg muscle, which could cause her to fall, and that it was possible that she might need more surgery. Appellee's objection to that testimony as speculative and lacking foundation was sustained. Under the state of that record, there was no abuse of the trial court's discretion in excluding that testimony.

INADEQUACY OF VERDICT

A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984).

On the issues of medical damages and proximate cause, Bay places reliance on the stipulation that if Dr. Hathaway were called as a witness, he would testify that the medical expenses of $7,350.73 were fair and reasonable and necessary for Bay's treatment and that they were proximately caused by the June 24, 1982, accident. The jury as trier of the facts need only consider that stipulation along with all of the other evidence on the issues presented by the court's instructions. We also consider it, *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982), along with the whole record.

Bay argues that the evidence shows a loss of wages in excess of $5,070, the stipulated medical expenses were $7,350.73, and those damages alone exceeded the verdict; therefore, the jury did not consider her damages for pain and suffering, disability, future medical expenses, and loss of future earning power. Problems with that argument include contrary and conflicting evidence on the issues of cause, intervening cause, extent of the claimed injury, and damages.

It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

There were many conflicts in the evidence relating to the

nature of Bay's injury, the course of treatment, the effect of the December 1982 fall at her home, the improvement of the condition of her knee, her ability to work, and the loss of wages. The jury could find that the evidence of future medical expenses and loss of future earning power was inconclusive. Her treating doctor only limited her work to preclude heavy lifting and climbing. Bay testified that she only looked at a few places for work and that she really wanted a part-time bookkeeping job, so that she could stay at home with her two children.

The jury resolved the conflicts in the evidence, and we cannot say that the verdict was either clearly erroneous or the result of mistake, or that the jury disregarded the evidence.

AFFIRMED.

ALICE M. HUEY, APPELLEE, V. DAVID DEAN HUEY, APPELLANT.
412 N.W.2d 83

Filed September 18, 1987. No. 85-962.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

John J. Respeliers and Thomas K. Harmon of Respeliers and DiMari, for appellant.

Jon S. Okun of Higgins, Okun & Calkins, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

David Dean Huey has appealed from the property division and award of alimony and child support contained in the decree dissolving his marriage to Alice M. Huey.

The decree awarded Alice child support in the amount of $300 per month for each of the parties' three children and alimony of $200 per month for 24 consecutive months.

Reviewing the record de novo, as we are required to do in cases of this nature, we find no abuse of discretion. *Nickel v. Nickel*, 225 Neb. 810, 408 N.W.2d 301 (1987).

The judgment of the district court is affirmed. Each party shall pay his or her own costs.

AFFIRMED.

MERICA FREELIN FOOKS, APPELLEE, V. JEFFREY NATHAN FOOKS, APPELLANT.

412 N.W.2d 469

Filed September 18, 1987. No. 86-052.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Michael J. O'Bradovich, for appellant.

No appearance for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal is directed toward the child support provisions of a decree of dissolution. The court ordered appellant to pay the sum of $127 per month child support for each of two children, increasing periodically until the children reach majority. The court further ordered payment of a portion of monthly child care expenses, not to exceed $171 per month, to be paid by appellant.

We have adopted child support guidelines to be effective October 1, 1987, which would fix the support obligation at approximately $253 per month for support (assuming the approximately equal income of the parties, as is the case here). The guidelines also specify that day care expenses are to be considered independently of the support amount. We are aware of the necessity in this case of child care for the two children of

tender years (6 and 3).

We are also aware that the appellant's net income is $850 per month. The ability of the appellant to pay, without completely removing any incentive but to run to avoid payments, it seems to us, cannot be fixed at an amount above $350 per month total support for the two children, including child care contributions. See *Salmon v. Salmon*, 219 Neb. 899, 367 N.W.2d 142 (1985). It is therefore the order of this court that the appellant, Jeffrey Nathan Fooks, pay $250 per month for support, and $100 per month for day care expenses, or a total of $350 per month. All such amounts are to be paid to the clerk of the district court. The order of the district court, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

JACK PARKER, APPELLEE AND CROSS-APPELLEE, V. SAINT ELIZABETH COMMUNITY HEALTH CENTER, APPELLEE AND CROSS-APPELLANT, STATE OF NEBRASKA, SECOND INJURY FUND, APPELLANT AND CROSS-APPELLEE.

412 N.W.2d 469

Filed September 18, 1987. No. 86-814.

1. **Workers' Compensation: Second Injury Fund.** If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
2. _____: _____. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
3. **Workers' Compensation: Appeal and Error.** The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are

not clearly wrong.

4. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
5. **Workers' Compensation.** Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his or her previous occupation or in any other established field of employment for which he or she is fitted. Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.
6. _____. A worker should not be denied compensation benefits for what is currently total permanent disability simply because his or her employability and earning capacity might become enhanced by rehabilitation and the permanent disability possibly reduced at some time in the future.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Spire, Attorney General, Martel J. Bundy, and Janie C. Castaneda, for appellant.

Scott A. Burcham of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Parker.

Anne E. Winner of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee Saint Elizabeth Community Health Center.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

This is an appeal from the Workers' Compensation Court by the State of Nebraska, Second Injury Fund (Fund). The principal legal question involved is whether, in cases of enhanced disability due to an earlier injury or disability, the Fund is obligated to pay benefits for other than permanent disability and an attorney fee where applicable. A subsidiary factual issue raised by Saint Elizabeth Community Health Center (Health Center) on cross-appeal is whether responsibility for the present degree of Jack Parker's permanent partial disability should be apportioned between the Fund and the Health Center. We affirm.

Parker had polio as a child. As a result, Parker wore a brace on his right leg, and, in order to walk, he had to put his weight

on his left leg and swing his right leg forward. On his Health Center employment application Parker indicated that he had had polio, wore a brace, and had back injury or low back pain. Parker testified that the way he had to walk caused slight discomfort in his back.

According to the stipulation of the parties, on July 15, 1982, Parker experienced a compensable injury by falling off a ladder while employed as an x-ray technician by the Health Center. He felt immediate pain in his left knee and in his back. Parker was hospitalized overnight and did not return to work until August 29, 1982. He continued to have trouble with his left knee and had increased back pain. Parker testified that because of the injury he favored his left knee, which changed his gait and put more strain on his back.

Parker was admitted to the hospital for arthroscopic surgery on September 29, 1983, and returned to work on November 1. He was terminated from the Health Center in September of 1985 for producing poor quality x-ray films. He had been put on probation for poor quality work in 1982 before the accident occurred. Parker testified that after the accident he tended not to retake poor quality films because walking was painful and he did not want to push the x-ray machine back to the patient's location.

After being terminated from the Health Center, Parker sold home water treatment systems. His pain became worse, and he resigned at the end of April 1986 and has not worked since that time.

On rehearing, the three-judge panel found that as a result of the injury, Parker incurred medical and hospital expenses and was temporarily totally disabled from July 15 through August 28, 1982, from September 29 through October 31, 1983, and from May 1 through July 24, 1986, which was the date of the rehearing, and that he would remain temporarily totally disabled for an indefinite period of time. The Workers' Compensation Court also found that Parker had suffered a 15-percent permanent partial impairment of his left leg as a result of the accident and injury.

The court further found that at the time of Parker's accident and injury he had a preexisting permanent partial impairment

resulting from polio. The court found that the disability that Parker suffered to his body as a whole as a result of the accident and injury, combined with the preexisting impairment, resulted in a disability substantially greater than that which would have resulted from the last injury considered alone. The court found that the Health Center had knowledge of Parker's preexisting impairment and thus found that the Fund should be liable for a portion of the benefits awarded to Parker.

The court found that Parker was entitled to benefits of $180 per week for 23 2/7 weeks of temporary total disability compensation to the date of the rehearing and was entitled to benefits of $180 per week for so long in the future as he should remain totally disabled. The court also found that Parker was entitled to benefits of $180 per week for 32 1/4 weeks for the 15-percent permanent partial disability to his left leg. The court additionally found that when Parker's total disability should cease, he shall be entitled to compensation for any residual permanent partial disability to his body as a whole due to the accident and injury. The court further found that the injury that Parker suffered would of itself have caused only a 5-percent permanent partial disability to the body as a whole, and thus the Fund was liable for the additional disability.

The court therefore ordered that Parker recover from the Health Center the sum of $180 per week for a period of 11 1/7 weeks for temporary total disability compensation through October 31, 1983, and thereafter and in addition thereto the sum of $180 per week for 32 1/4 weeks for the 15-percent permanent partial disability to his left leg, and thereafter and in addition thereto the sum of $9.20 per week for 288 6/7 weeks for the 5-percent permanent partial disability to his body as a whole, less a credit for temporary total disability already paid. The court also ordered the Health Center to pay Parker's medical expenses already incurred and any future medical and hospital expenses reasonably necessary as a result of the accident and injury. The Health Center was also ordered to pay attorney fees of $1,000.

The court ordered that Parker recover from the Fund the sum of $170.80 per week for temporary total disability from and after May 1, 1986, up to the date of the rehearing and

thereafter so long in the future as Parker shall remain totally disabled. If Parker remains totally disabled for longer than 300 weeks, the Fund was ordered to pay $180 per week for so long as he shall remain totally disabled. If Parker's total disability ceases before the expiration of 300 weeks, the Fund was ordered to pay compensation for that permanent partial disability that Parker thereafter suffers in excess of 5 percent.

The court also found that as a result of the accident and injury Parker was unable to perform work for which he has previous training or experience and was entitled to vocational rehabilitation services and approved his participating in an 18-month program at Southeast Community College resulting in an associate degree in business.

The Fund appeals from the award on rehearing, alleging that the Workers' Compensation Court erred in providing that the Fund be responsible for paying $170.80 per week for so long as Parker should remain temporarily totally disabled, including the period that he is undergoing vocational rehabilitation. The Fund also alleges that the court erred in providing that the 32 1/4 weeks of compensation awarded to Parker for the 15-percent permanent partial disability to his left leg should not reduce the 300-week period of compensation to which he is entitled for the disability to his body as a whole.

On cross-appeal, the Health Center alleges that the court erred in assessing responsibility to the Health Center for the entire 15-percent permanent partial disability to Parker's left leg.

Neb. Rev. Stat. § 48-128 (Reissue 1984) provides in pertinent part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined

> disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

The Fund argues that because the statute mentions only permanent partial or permanent total disability, the Fund should be liable only for permanent benefits and not for temporary benefits, including those paid while a plaintiff is undergoing vocational rehabilitation. However, the purpose of the Fund is as follows:

> If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.

Benson v. Barnes & Barnes Trucking, 217 Neb. 865, 874-75, 354 N.W.2d 127, 133 (1984). Such funds were created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability. See 2 A. Larson, The Law of Workmen's Compensation § 59.31(a) (1987).

In the present case, but for the preexisting condition of polio, the torn medial meniscus that Parker suffered as a result of the accident would not have resulted in total disability. Dr. Garvin testified by deposition that, but for the polio, Parker probably

would have been able to return to his job as an x-ray technician after undergoing his surgery for a torn meniscus. He further testified that Parker was no longer able to push the x-ray machine around, that Parker had difficulty climbing ladders and with prolonged walking or standing, and that those problems would be permanent in nature. Dr. Garvin concluded by stating that in his opinion Parker would only be able to do work where he could sit most of the time and not work under pressure and that he would have difficulty engaging in any employment that would require him to be on his feet or to ambulate for any significant period of time.

In his written report found in the record Dr. Garvin stated:

> Because it has been my observation that the job of an x-ray technician requires a rather significant amount of walking, some elements of lifting, and general requirements for mobility, including pushing machines about the hospital to obtain x-rays, I feel that it is unlikely that Mr. Parker can return to that type of activity. In terms of future employment, I would feel that an occupation that would allow Mr. Parker to sit and not be required to constantly move above [sic], would be of benefit for him. He does have rather severe limitations in his ability to walk long distances, to climb ladders, to lift heavy objects over 20 or 30 lbs., not only because of his pre-existing polio condition, but also because of the more recent injuries to his low back as well as his left knee as a result of the fall from the ladder in July of 1982.

Tom Steel, a counselor with Nebraska Division of Rehabilitation Services of the State Department of Education, evaluated Parker and testified by deposition that based on his examination of the medical reports and his own observations as to the pain Parker seemed to be suffering from during his evaluation, Parker would have to have a strictly sedentary type of employment and could not return to that work for which he had already been trained. It was Steel's opinion that Parker would have to be retrained so as to qualify as an accountant or bookkeeper and that Parker was capable of completing such training.

Parker himself testified that his condition had been getting

progressively worse, that he cannot even mow his lawn, that he has difficulty walking up stairs, and that he cannot work as an x-ray technician. He tried selling water treatment systems, but had to quit that because of the pain in his back. He also stated that he could no longer do real estate sales work or retail sales work, both of which he had done before. He had applied for jobs at convenience stores, even though that would require some standing, but had been unsuccessful. He knew of no sedentary-type job for which he had the necessary education, experience, or training. There was no type of work that he felt he could do physically without vocational training.

By whatever name it called Parker's condition, the compensation court correctly found as a matter of fact that Parker was, and until rehabilitated would continue to be, totally disabled. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987). Furthermore, a proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. *Caradori v. Hamilton*, 193 Neb. 500, 227 N.W.2d 850 (1975).

Parker's physician testified that Parker could no longer do the things necessary to be an x-ray technician and could do no job that would require him to stand, walk, or lift in a significant manner. He said that condition was permanent. Tom Steel concluded that Parker could not return to work for which he had been trained and, in effect, until retrained was unable to obtain a meaningful sedentary job. Parker's own testimony supported that conclusion.

> Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted. [Citation omitted.]
>
> Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.

Boults v. Church, 200 Neb. 319, 320-21, 263 N.W.2d 478,

479-80 (1978).

A similar situation was addressed in *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). The plaintiff had undergone several back operations unrelated to his employment with the defendant, and the employer knew of these prior problems. During the course and scope of employment, the plaintiff slipped and fell, injuring his neck. The employer paid the appropriate weekly rate during the plaintiff's recuperation period of about 2 years. The remainder of the plaintiff's 300-week maximum benefits for partial disability was assessed to the employer at 7 1/2 percent permanent partial disability, with the Fund responsible for the balance. The Fund was also ordered to pay the plaintiff's benefits in full after the expiration of the 300-week period and "for the duration of plaintiff's total disability." *Id.* at 190, 322 N.W.2d at 401. The court also found that the plaintiff was entitled to vocational rehabilitation services.

The Fund in *Pollard* contended that because the compensation court did not specifically find that the plaintiff's total disability was permanent, the Fund was not liable until such a finding was made. This court stated:

> Essentially, the fund argues that the requirement of vocational rehabilitation indicates that total disability at the present time might be reduced to some lesser percentage of partial permanent disability in the future as the result of such training, and that therefore present total disability is not a fixed, stable, or nonrecoverable disability and consequently is not permanent. It argues that unless there is a finding that total disability is permanent, it must be regarded as temporary and the fund cannot be held liable until that specific finding of fixed and permanent disability is made. We disagree.

Id. at 192-93, 322 N.W.2d at 402.

This court found in *Pollard* that the Fund was liable for the plaintiff's disability in excess of the 7 1/2 percent that he would have incurred without the prior disability. Because the plaintiff could not return to the kind of work for which he had training and experience, he was at the present time totally and permanently disabled, although that disability might be

reduced when vocational rehabilitation was complete. The court reasoned as follows: "The plaintiff should not be denied compensation for what is currently total permanent disability simply because his employability and earning capacity might become enhanced by rehabilitation and his permanent disability possibly reduced at some time in the future." *Id.* at 194, 322 N.W.2d at 402.

In the present case Parker should not be denied compensation simply because the Workers' Compensation Court used the term "temporary" instead of "permanent," nor should the Health Center be required to pay this compensation. Parker would not be totally disabled, nor would he need vocational rehabilitation, but for the polio. Thus, to carry out the purposes of the Fund, the court correctly ordered that the Fund pay temporary total disability benefits to Parker.

Parker started his vocational rehabilitation program on July 10, 1986, and the Fund believes it should not be liable for any payments during this program. We do not agree. Payments during vocational rehabilitation are covered in Neb. Rev. Stat. § 48-121(5) (Reissue 1984), which states: "The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation." Again, we do not agree that the term "temporary" relieves the Fund from liability. Parker would not need vocational rehabilitation but for the polio. Thus, the Fund was properly assessed payments during this time.

Section 48-121(5) provides that the employer should pay benefits while an employee undergoes rehabilitation. In *Pollard v. Wright's Tree Service, Inc., supra*, the Fund was determined to be an employer for the purposes of awarding attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1978). The logical extension of this determination is that the Fund may also be considered a statutory employer for the purposes of payment of disability during rehabilitation. Thus, the Fund's first assignment of error is without merit.

The Fund's second assignment of error involves § 48-121. This section was discussed in *Norris v. Iowa Beef Processors*, 224 Neb. 867, 877, 402 N.W.2d 658, 666-67 (1987):

"Section 48-121 . . . provides for compensation for

> three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to functional and medical loss alone. [Citations omitted.] Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. [Citations omitted.] . . ."

Quoting *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

Section 48-121(2) provides for a 300-week limitation on payments for partial disability and states that should total disability be followed by partial disability, the period of 300 weeks shall be reduced by the number of weeks during which compensation was paid for such total disability. The compensation court in the present case noted that § 48-121 does not provide that the 300-week period should additionally be reduced by the number of weeks during which compensation is paid for a disability under subsection (3). The court also noted that subsections (1) and (2) compensate impairments of the body as a whole in terms of loss of employability and earning capacity, while subsection (3) compensates impairments of scheduled members on the basis of loss of physical function. See *Norris v. Iowa Beef Processors, supra*. Thus, it determined that the 32 1/4 weeks of compensation to which Parker is entitled by reason of the 15-percent permanent partial impairment to his left leg should not reduce the 300-week period of compensation to which he is entitled by reason of the disability that he suffered to his body as a whole.

We agree that § 48-121 does not require that the 300-week period of compensation be reduced by the number of weeks during which compensation is paid under subsection (3). Therefore, the Fund's second assignment of error is also meritless.

On cross-appeal, the Health Center contends that it should be held liable for only 10 percent of the 15-percent permanent partial disability to Parker's left knee, with the Fund responsible for the remaining 5 percent. The Health Center argues that because Parker did not have developed muscles due to the polio, he was unable to fully rehabilitate his leg.

As previously stated, in reviewing workers' compensation cases, this court does not reweigh the facts. In a review of a workers' compensation case, the findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987).

The Health Center points out that Dr. Garvin testified by deposition that, generally speaking, a healthy individual with good quadriceps and hamstrings can rehabilitate himself or herself to about a 10-percent loss of function after medial meniscus arthroscopic surgery. However, Dr. Garvin also testified that permanent partial disability after such surgery ranges from 5 percent to 20 percent. In addition, the following exchange took place:

> Q. And you have, as I understand, assessed a 15 percent disability to the left leg as a result of the medial meniscus surgery?
>
> A. Correct.
>
> Q. All right. And Doctor, had Mr. Parker been able to — not have polio and have well developed quadriceps and hamstrings, would he have been able to rehabilitate himself in a greater fashion so that it would have reduced that disability rating that you had — you have given to us?
>
> . . . .
>
> A. Well again, it's somewhat speculative because every case in this business is very individual. And it's possible that a normal, active individual could wind up with a lesser loss of function. Or it's possible he could wind up with more of a loss of function if the rehabilitation program didn't work for one reason or another, or if the — if the individual didn't cooperate. So that I guess I, you know, I —

Because there was evidence that even a healthy individual may rehabilitate himself or herself to a 15-percent permanent partial disability, the court was not clearly wrong in finding that Parker's entire 15-percent permanent partial disability should be assessed against the Health Center, and this assignment of error is without merit.

The judgment of the Workers' Compensation Court is affirmed. Parker is awarded $1,000 for services of his attorney in this court, to be assessed jointly against the Second Injury Fund and Saint Elizabeth Community Health Center.

AFFIRMED.

DARWIN NICE, APPELLEE, V. IBP, INC., APPELLANT.

412 N.W.2d 477

Filed September 18, 1987. No. 86-933.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Expert Witnesses: Appeal and Error.** As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
3. **Expert Witnesses.** A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
4. **Workers' Compensation: Appeal and Error.** The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Wayne E. Boyd of Smith & Boyd, for appellant.

LeRoy J. Sturgeon of Smith & Smith, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

This is an appeal in a proceeding under the Nebraska Workers' Compensation Act. The plaintiff, Darwin Nice, alleged that he sustained a back injury as a result of accidents occurring on June 4, 1985, and January 13, 1983, while employed by the defendant, IBP, inc., as a beef trimmer in its plant in Dakota City, Nebraska.

After the hearing before a single judge, the compensation court found that the plaintiff was involved in an accident on June 4, 1985, but there was no evidence of temporary or permanent disability as a result of that accident. The court further found that a previous award as the result of the January 13, 1983, accident was res judicata, and the plaintiff was not entitled to recover any additional compensation as the result of either accident.

On rehearing the compensation court found, with one judge dissenting, that the plaintiff had incurred hospital and medical expenses as a result of the injury received in the accident on June 4, 1985, and was temporarily totally disabled as a result of the injury. The court further found that in addition to compensation, the plaintiff was entitled to vocational rehabilitation services. From that award, the defendant has appealed.

The principal issues in this case are whether the evidence is sufficient to support a finding that Nice's disability is the result of an accident arising out of and in the course of his employment, and whether there has been any increase in disability that can be attributed to the accident on June 4, 1985.

> The findings of fact made by the [compensation court] after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the [compensation court] may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

Neb. Rev. Stat. § 48-185 (Reissue 1984).

> "Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . ."

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 779, 408 N.W.2d 280, 285-86 (1987).

The three-judge panel based its award on the expert testimony of Drs. Blume, Keane, Isgreen, and Dougherty. The compensation court chose to believe the testimony of Drs. Blume and Dougherty, who stated by way of deposition that Nice's 1985 injury aggravated his preexisting condition. At the same time, the court rejected the testimony of Dr. Isgreen, who concluded that Nice's condition was not aggravated by the 1985 accident.

Dr. Martin's, Dr. Dougherty's, and Dr. Blume's depositions all state with varying degrees of specificity that the 1985 accident played some role in "lighting up" Nice's preexisting back problems. Dr. Martin stated: "[T]he June '85 accident probably aggravated the previous conditions." Dr. Blume stated: "[T]he accident sustained in 1985 has aggravated a pre-existing condition . . . . [T]he patient is suffering from the accident in 1985 with low back and leg pain condition," and Dr. Dougherty stated: "[T]he incident of '85, I suppose that could have aggravated it. . . . That probably aggravated it." Dr. Isgreen, on the other hand, stated that the past accidents encountered by Nice would not be aggravating to Nice's preexisting condition.

As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court. *Ward v. City of Mitchell*, 224 Neb. 711, 400 N.W.2d 862 (1987).

The defendant argues that because Drs. Martin and Blume did not have opportunity to examine Nice at the time of both his 1983 and his 1985 accidents, they have no basis for concluding that the 1985 accident aggravated his condition. This was an issue to be resolved by the trier of fact. In *Zaleski v. Farmland*

Foods, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985), we held that:

> A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Upon the record before us, we cannot conclude that the three-judge panel was "clearly wrong" in finding that Nice's June 4, 1985, accident aggravated his preexisting condition.

The final issue for consideration is the award of vocational rehabilitation. An injured employee is entitled to vocational rehabilitation services:

> When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

Neb. Rev. Stat. § 48-162.01(3) (Reissue 1984).

A determination made by the compensation court after rehearing is accorded great deference: "The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong." *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 62, 387 N.W.2d 709, 713-14 (1986); *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987); *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986); *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986).

The defendant relies on Nice's assertions that he continued to work for IBP at a regular job, that he was able to perform that job, and that he was not under a continuing course of medical treatment after the June 1985 accident.

All of the physicians who treated Nice restricted his working activities significantly, and Drs. Martin, Blume, and Keane

specifically raised the issue of vocational rehabilitation or retraining.

In his deposition, Dr. Martin stated:

> And the other thing I've suggested to him, which I think he should go through, rehab training and go for a different job. I don't care what he does. I don't think he's going to be able to do physical work anywhere, no matter whether it's Iowa beef or a farm. I don't care where it's at. I just think he's not going to be able to do it.
>
> . . . .
>
> . . . I advised him to go into rehab and try to do something different.

Dr. Blume stated:

> I told the patient if he can, avoid to do any heavy lifting, and that if he has the opportunity, to walk around, and that he should try to see if he can get less strenuous physical activity in his work activity.
>
> . . . .
>
> . . . And that he should be retrained for a kind of job that he can perform with the least amount of back pain and discomfort.

Finally, Dr. Keane stated: "Would authorize vocational rehabilitation for him if that would be helpful or if necessary in order to try to get him to have a different job. . . . Again, I don't believe he's going to be able to do heavy work. He's a candidate for vocational rehabilitation."

The evidence supports the compensation court's award of vocational rehabilitation. The judgment is affirmed.

The plaintiff is allowed $1,000 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THEODORE W. PARSONS, JR., APPELLANT.

412 N.W.2d 480

Filed September 18, 1987. No. 86-934.

1. **Verdicts: Appeal and Error.** On appeal, the verdict of the district court will not be reversed if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support it.
2. **Trial: Evidence: Presumptions.** In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
3. **Homicide: Photographs.** Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

J. William Gallup, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Douglas County. The appellant, Theodore W. Parsons, Jr., waived a jury trial and was found guilty of first degree murder and the use of a firearm to commit a felony for the killing of Burke High School teacher Jill Garlock. Appellant was sentenced to life imprisonment for the first degree murder conviction and a consecutive sentence of 5 years on the firearm conviction. This appeal follows.

The appellant met the deceased in the summer of 1979 while he was stationed at Offutt Air Force Base. The two became romantically involved later that year, living together on and off from that time on. In 1985 the appellant was transferred to Scott Air Force Base, located in Belleville, Illinois, and was stationed there at the time of the offense which gave rise to this case.

On April 9, 1986, Parsons and Garlock had a particularly serious argument on the telephone, during which the deceased informed him that she wished to terminate their relationship. At about 12:30 in the morning of April 10, Parsons left Scott Air Force Base and drove to Omaha with the hope of reconciling with Garlock. He arrived in Omaha at 8:30 or 9 a.m. and went directly to Garlock's house, where, knowing that she would not be home until approximately 10 o'clock that night, he parked his car in her garage and slept for several hours. After awakening, Parsons went out, and returned to Garlock's home at approximately 3:30 or 4 p.m. At that time he parked his car away from the home, fearing that the deceased would not return home if she knew he was at the house. Parsons possessed a key to the home and a remote-control garage door opener. Parsons again left, for dinner, and returned, again parking his car some distance from the Garlock residence. The deceased returned home around 10:15 p.m.

Parsons stated that the victim called someone when she returned home, during which time he waited upstairs. At this time Garlock did not know he was in her home. Parsons went downstairs after she got off the telephone and found her asleep on the couch. He woke her, and the two began to argue. Parsons stated that Garlock was very angry that he had come to Omaha. The two argued for some time, and finally Garlock stated that she was tired and wanted to go to bed. She reiterated that their relationship was over. Parsons said that he told the victim that he now had nothing to look forward to, to which she allegedly asked why he did not kill himself. Parsons stated that he told the deceased that he had considered suicide and asked her if his suicide would bother her. She answered no. The argument continued in her bedroom, ending when Garlock went to bed. Parsons then went across the hall to another bedroom, where he had left his belongings. He retrieved his .357 Magnum, returned to Garlock's room where she was sleeping, and shot and killed her. Jill Garlock died as a result of this single gunshot wound to her head.

The body of the victim was discovered on the morning of April 11 by a Burke High School assistant principal. The appellant was arrested upon his return to Scott Air Force Base,

and later confessed to the murder.

On appeal, the appellant assigns as error that the district court erred in refusing to grant his motions to dismiss both at the close of the State's case and at the conclusion of the trial. Appellant also assigns as error the lower court's admitting into evidence photographs of the victim's body and a tape recording of a conversation between the victim and the dispatcher of the Nebraska State Patrol. We affirm.

Addressing his first assignment of error, Parsons argues that there was insufficient evidence to support a conviction of first degree murder. Taking the evidence in the light most favorable to the State, *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986), we find that there is sufficient evidence to support the verdict.

The appellant centers his argument around the testimony of the officers who interrogated him and to whom he stated that he waited until the deceased was asleep before shooting her. The record reveals that Parsons stated that he waited so that Garlock would not feel any pain. The evidence shows that Parsons had to go across the hall to retrieve his gun from another bedroom, where he had left his belongings. Parsons testified that he watched the victim cry for a little while and went to get the gun to see her reaction to his putting the gun to his head. Parsons never woke the victim before he fired. The appellant admits that he hid his presence from the victim until sometime after she returned home by parking his car away from the Garlock residence and by remaining upstairs while the victim was on the phone. Parsons also stated that when entering the deceased's bedroom with the gun, he kept the weapon hidden behind his back. At trial a psychiatrist testified that although the appellant's actions showed impulsiveness, they also illustrated some deliberation, noting the single, aimed gunshot to the victim's head. This evidence, if believed by the trier of fact, is sufficient to support a conviction of first degree murder. *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

Appellant also argues that the testimony of the officers is inherently unreliable, as the notes taken at the interrogation were destroyed, thereby eliminating cross-examination of the

testimony. In *El-Tabech*, we stated:

> [T]he Supreme Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Id. at 405, 405 N.W.2d at 592. This assignment of error is without merit.

The appellant's next assignment of error alleges that a taped conversation between the deceased and the dispatcher for the Nebraska State Patrol was improperly admitted into evidence, arguing that the district court was unduly influenced by the tape. The tape consists of a conversation during which the victim asks the help of the State Patrol in locating her boyfriend, identified as Ted Parsons, en route from Illinois to Omaha. The victim is noticeably upset and expresses concern for her welfare.

It is axiomatic that the trial court is given broad discretion in the admission of evidence, and such rulings will not be overturned on appeal absent a showing of an abuse of discretion. *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). In cases in which there is no jury, there is a presumption that only competent, relevant evidence is considered. *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985). The assignment is without merit.

Finally, Parsons argues that certain pictures of the victim were incorrectly admitted into evidence and unduly influenced the judge in his deliberations. The pictures at issue include: (1) a photo of the victim at the scene, showing head and hand wounds; (2) a photo of the victim at the scene, showing lividity; (3) a photo of the victim at the scene, showing the exit wound; (4) a photo of the victim at the scene, showing the entrance wound and markings from the powder burns; (5) a photo of the bedding, before the victim was removed, showing the path of the bullet; (6) a photo of the top pillow, before the victim was removed, showing the bullet hole; (7) a photo of the victim's head and hand, showing the hand wound; (8) a photo of the victim's body supine on the morgue stretcher; (9) a photo of

the entrance wound, with the area cleaned; (10) a photo of the exit wound, with the area cleaned; and (11) a photo of the hand wound, with the area cleaned.

The appellant bases his argument on a comment by the district court judge that he considered the evidence in the case until 4:30 a.m., arguing that the photos were prejudicial and were incorrectly used in the court's deliberations. As noted above, we presume that the court considered only competent and relevant evidence in its deliberations. *State v. Thierstein, supra.* The appellant has not shown otherwise.

Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986); *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984). The gruesome nature of photos alone will not keep them from the trier of fact, so long as the probative value is not outweighed by the prejudicial effect. *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). The photos were admitted for the above purposes, and we cannot say that the photos were unduly prejudicial or that their probative value was outweighed by their prejudicial effect. The appellant has not shown that the district court abused its discretion in admitting the photos. *State v. Threet, supra.* This assignment is also without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS E. SORICH, APPELLANT.
412 N.W.2d 484

Filed September 18, 1987. No. 86-979.

1. **Criminal Law: Trial: Prisoners.** Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.

2. **Criminal Law: Trial: Prisoners: Escape.** When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Pursuant to a verdict, defendant-appellant, Douglas E. Sorich, was adjudged guilty of escape in violation of Neb. Rev. Stat. § 28-912(1) (Reissue 1985). He was thereafter sentenced to imprisonment for a period of 1 year. In his appeal to this court, he assigns as error, through his attorney, the district court's failure to declare a mistrial because he was displayed to the jury "wearing identifiable jail clothes." In addition, Sorich, on his own behalf, apparently asks that we reverse his conviction and dismiss the charge for a variety of other reasons. We affirm.

As the result of a prior felony conviction, Sorich was incarcerated, assigned to a work release program, and employed as a printing press operator in Omaha. Sorich was informed of the limitations on his movements while in the program and on March 11, 1986, signed a "Community Release Program Agreement and Honor Pledge," which recites in part:

> I understand that:
>
> 1) Extended limits shall mean the Post Care Center to which I am assigned and its immediate area;
>
> 2) Extended limits shall also mean the most direct route to and from my place of employment/school and the assigned Post Care Center;
>
> 3) Extended limits shall include those areas necessary in the course of my normal employment/studies and those areas which have been authorized by Program personnel.
>
> I have been advised and understand that failure to

> remain within the extended limits as hereinabove set forth may be deemed as ESCAPE from custody and may be prosecuted to the fullest extent of applicable state law.

(Emphasis omitted.)

Nonetheless, on the evening of May 19, 1986, Sorich failed to return to the center after work and was accordingly listed as an escapee. He was continuously absent until 10:10 p.m. on June 1, 1986, when he voluntarily returned to the center. Sorich was thereupon placed under arrest, and trial on this escape charge followed.

After Sorich, through his attorney, had informed the court there was no objection to his being tried while wearing prison clothing, the attorney, sometime before conducting his voir dire examination of the venirepersons empaneled for the case, moved for a mistrial on the ground that requiring Sorich to stand trial in "his jail garb," an "orange jumpsuit," would unfairly prejudice his cause. In overruling the motion the court questioned the timeliness of the motion and observed that, in any event, the nature of the charge was such that the State, to be successful, would have to prove that at the time Sorich absented himself from the center, he was incarcerated for having committed a felony.

Indeed, a stipulation to that effect was entered into by Sorich and the State and put before the jury. Further, Sorich took the stand in his own defense and admitted that he was at that time incarcerated for having committed a felony, specifically, theft by deception.

Relying on *People v. Shaw*, 381 Mich. 467, 164 N.W.2d 7 (1969), Sorich urges that when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted. While we agree such should be the general rule, we must observe that when such a defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing. As noted in *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), *cert. denied* 411 U.S. 971, 93 S. Ct. 2166, 36 L. Ed. 2d 694, no prejudice can result from seeing that which is already known. See, also, *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Thus, assuming, but not

deciding, that Sorich's motion for mistrial was timely made and properly raised the issue of his dress, denial of the motion was not prejudicially erroneous in this case.

On his own behalf Sorich also appears to claim that the lower court erred in overruling his motions to dismiss the escape charge on a number of grounds which may be summarized as claiming that (1) he was unlawfully singled out for prosecution; (2) there was no "escape" within the meaning of § 28-912(1); (3) he had no "intent" to escape; (4) he was "privileged" to escape; (5) his attorney was ineffective; (6) § 28-912(1) is unconstitutionally vague and overbroad, thereby depriving him of due process and equal protection of the laws; (7) he was deprived of his privilege against self-incrimination; and (8) his sentence is excessive and subjects him to double jeopardy. The record fails to support any of those claims.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

EVA SHARON BURTON, APPELLEE, V. RANDY ALAN BURTON, APPELLANT.

412 N.W.2d 486

Filed September 18, 1987. No. 87-021.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Gregory A. Pivovar, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from a decree of dissolution entered by the district court for Sarpy County, Nebraska. Husband appeals, alleging that the district court abused its discretion in

determining the amount of child support to be paid by the husband and in dividing property between the parties.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987).

From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF IOWA EX REL. JANET C. PETERSEN, APPELLEE, V. DENNIS FRANK MINER, APPELLANT.

412 N.W.2d 832

Filed September 25, 1987. No. 85-142.

1. **Foreign Judgments: Child Support.** Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
2. **Foreign Judgments: Child Support: Minors.** In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James M. Haney, for appellant.

William L. Monahan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from an order of the district court for Douglas County, which ordered appellant father to pay support for a child who resided in Iowa and was in the custody of appellee mother.

The action originated in Iowa under the Iowa equivalent of the Nebraska Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984) (URESA). In the petition filed in Iowa (the initiating state), the appellee alleged that under the terms of an Iowa divorce decree the appellant obligor owed a duty of support for two dependent children, Penny Miner, born February 2, 1966, and Tim Miner, born December 17, 1964. Appellee requested enforcement against appellant, who was alleged to be living in Omaha, Nebraska.

A judgment of support was entered directing the matter to be forwarded to the district court for Douglas County. Notice was served on appellant. At the time of the hearing Tim Miner was an adult under both Nebraska law (at 19) and Iowa law (at 18). No further action was had with respect to Tim Miner. The court entered judgment for certain arrearages due the appellee on account of Penny Miner. No appeal was taken from this order, and it is final.

The decree of the Iowa court in the divorce case, which modified a previous decree, mentions a third child, Wendy Miner. No provision or order for support of Wendy is contained in the divorce decree before us. There is no mention of Wendy in the reciprocal petition or the Douglas County District Court decrees in response to that petition. In August 1984 a motion was filed in the district court for Douglas County, alleging that through oversight Wendy's name was omitted from the reciprocal petition and subsequent order of the district court for Shelby County, Iowa. The applicant prayed that the order of support be modified to include Wendy and to order appellant obligor to pay support. The modification was ordered, and this appeal follows.

Appellant, in his assignments of error, alleges that the district court lacked jurisdiction to find a duty of support for Wendy which had not been established by the trial court in the initiating state. For reasons that will follow, we hold that the district court properly found that appellant had a duty to support his child, Wendy, and was correct in ordering payments in support.

Appellant asserts that URESA was enacted *only* for the purpose of enforcing foreign support orders "and not for modification, increase, or decrease of rights due to a prior decree." Brief for Appellant at 10. This position misstates case law as well as the language of the statutes. This court has previously held that "[u]nder [URESA] the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state." *Chisholm v. Chisholm*, 197 Neb. 828, 830, 251 N.W.2d 171, 173 (1977). In addition, the act itself provides that its purpose is "to improve and extend by reciprocal legislation the enforcement of *duties of support*." (Emphasis supplied.) § 42-762. These "duties of support" are not limited to duties previously imposed by a sister state. They include duties "imposable by law or by order, decree, or judgment of any court . . . ." § 42-763(b). Finally, "imposable by law" is defined as imposable by both common law and statutory law. § 42-763(e).

It seems clear from the face of the act that not only existing orders of support but also existing duties of support which have not been the subject of adjudication may be enforced under part III of URESA. §§ 42-768 et seq. Secondary authorities, as well as courts in other jurisdictions, are in accord with this proposition. One expert, Professor W.J. Brockelbank, has stated that it is a "misconception" that

> only *orders* of support of one state will be enforced in another under the Act. In fact it is "all duties," and the duty, of course, may grow out of the order of support or a judgment or decree but is equally a duty if it never has received judicial attention and now is the basis of litigation for the first time under the Act.

W. Brockelbank, Interstate Enforcement of Family Support 39 (F. Infausto 2d ed. 1971).

Many other jurisdictions have held, and we agree, that the "[p]rovisions of URESA make clear that its applicability is not dependent on the existence of other proceedings." *England v. England*, 337 N.W.2d 681, 683 (Minn. 1983). URESA has often been interpreted to require application of the act in cases in which a duty to support a child is "imposable" by either common law or statutory law. See, e.g., *Johnson v. Ross*, 405 N.E.2d 569 (Ind. App. 1980); *Olson v. Olson*, 534 S.W.2d 526 (Mo. App. 1976); *State ex rel. State of Cal., etc. v. Lagoy*, 54 Or. App. 164, 634 P.2d 289 (1981).

In a URESA proceeding, the initiating state need not determine whether a duty of support exists. Ordinarily, the duty of a parent to support his or her child is imposable by the responding state, even though no previous order of support exists. *Commonwealth of Virginia v. Autry*, 293 Md. 53, 441 A.2d 1056 (1982). See, also, *State ex rel. Alleman v. Shoats*, 101 N.M. 512, 684 P.2d 1177 (1984).

Appellant is concerned that URESA is being used to *create* a duty of support rather than merely *enforcing* such duty. He is correct that URESA "itself creates no duties of family support but leaves this to the legislatures of the several states." Unif. Reciprocal Enforcement of Support Act, Prefatory Note, 9B U.L.A. 382 (rev. 1968). Appellant's obligation to support his minor children was not created by URESA. The common law and statutory laws of most states, including Nebraska and Iowa, provide that parents have an obligation to support their minor children. *Coffey v. Coffey*, 205 Neb. 191, 286 N.W.2d 753 (1980); *In re Marriage of Hoak*, 364 N.W.2d 185 (Iowa 1985). In this case, URESA was used only to enforce appellant's legal obligation to contribute to the support of his children. The act did not independently create this obligation.

Appellant also asserts, in his assignments of error, that the district court erred in finding that the legal age of majority would be governed by Nebraska law, age 19 (Neb. Rev. Stat. § 38-101 (Reissue 1984)), rather than Iowa law, age 18 (Iowa Code Ann. § 599.1 (West 1981)). We hold that the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support. *Neff v. Johnson*, 391 S.W.2d 760 (Tex. Civ. App. 1965); *Jane S. D. v.*

Francis X. D., 110 Misc. 2d 737, 442 N.Y.S.2d 918 (1981).

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

KENNETH G. STREMMEL, APPELLEE, V. ROSELLA J. KINNEY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, DONALD DAEGES, DOING BUSINESS AS OMAHA REAL ESTATE COMPANY, THIRD-PARTY DEFENDANT, APPELLEE.

412 N.W.2d 834

Filed September 25, 1987. No. 85-619.

Contracts: Proof. Where, in a suit on a contract, the plaintiff's evidence establishes acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Christine P. Costantakos, for appellant.

William E. Pfeiffer of Spielhagen & Pfeiffer, Associates, for appellee Stremmel.

John M. Burns of Schmid, Ford, Mooney & Frederick, P.C., for appellee Daeges.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from the district court for Douglas County. Rosella J. Kinney appeals from the district court's decree of specific performance ordering the appellant to comply with the uniform purchase agreement entered into between herself and appellee Kenneth G. Stremmel. The facts relevant to this appeal are as follows.

Sometime in September of 1981, real estate broker and third-party defendant in this case, Donald Daeges, investigated

the ownership of certain fourplexes located in Omaha on North 52d Street. Through his research Daeges determined that the appellant owned one of the buildings. Daeges then contacted Kinney to determine whether she was interested in selling her fourplex. She replied that she had, in fact, been thinking of selling. The two met on October 15, 1981, and entered into a listing agreement at a selling price of $72,500.

Thereafter, Daeges contacted Stremmel, to whom he had previously sold property and who owned a fourplex immediately adjacent to the appellant's. On October 19 Stremmel submitted a uniform purchase agreement, offering to buy Kinney's fourplex at a price of $65,000. Daeges testified that the offer was shown to Kinney, who signed the acceptance portion of the agreement conditioned upon a selling price of $67,000. On October 20 Daeges took the counteroffer to Stremmel, who rejected it and executed another uniform purchase agreement, offering to purchase the fourplex at a price of $66,000. Kinney signed the acceptance portion of the uniform purchase agreement, which is the subject of this litigation, that same day.

On or about the 26th of October, the appellant told Daeges that she was unwilling to complete the sale for various reasons. Stremmel testified that a "couple of weeks" later he was told that the appellant was not going to complete the agreement. Stremmel testified that on and after October 20 he was ready, willing, and able to complete the contract.

Stremmel filed a petition on May 13, 1982, for specific performance. With her amended answer Kinney also filed a third-party petition for declaratory judgment, joining Daeges. Stremmel's petition for specific performance was granted, and appellant's third-party petition for declaratory judgment was dismissed. Appellant's motion for new trial was denied. This appeal follows.

Appellant now alleges as error that the district court's decree of specific performance was not supported by clear and convincing evidence and that the lower court's dismissal of her motion for declaratory judgment was erroneous. Finding that the appellee Stremmel met his burden of proving a valid and binding contract, we affirm.

Appellant supports her first assignment of error by arguing that Stremmel did not prove a valid and legally enforceable contract, as he failed to prove that the appellant's acceptance was communicated to him prior to the communication of the appellant's rejection of the offer and revocation of acceptance. The rules regarding this matter were thoroughly discussed in *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945), where we said:

> "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action." . . .
>
> . . . .
>
> "The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party."

(Citations omitted.) *Id.* at 125, 18 N.W.2d at 650-51.

In this case the burden was on the appellant to establish, by a preponderance of the evidence, that she had revoked her acceptance of the offer prior to communication of her acceptance to the offeror. Once the contract was offered and received in evidence, if no other evidence was offered by the seller, the buyer would be entitled to judgment. This rule of proof properly places the burden on the party who would suffer loss if the issue were not established. *Id.*

The defendant in *Kuehnle v. Augustin*, 333 Ill. 31, 164 N.E. 194 (1928), asserted a similar failure in the bargaining process. In that case the Illinois Supreme Court held that in a suit for specific performance it was the defendant's burden to establish that she withdrew her offer before the contract was executed by the plaintiff.

The record in this case indicates that the seller in her answer never denied the existence of a contract. Quite to the contrary, she alleged that in fact there was a contract, but argued that it would be inequitable for the court to enforce the terms of the contract. Specifically, she alleged, "[T]he purchase agreement

described in plaintiff's Petition is an invalid contract at law and without adequate and sufficient consideration, and specific performance should be denied." Nowhere in her answer did she allege that she had revoked her acceptance of the offer, thereby preventing the contract from coming into being. As such, we are precluded from considering the issue.

The appellant relies on our earlier decision in *Pribil v. Ruther*, 200 Neb. 161, 262 N.W.2d 460 (1978). In *Pribil* evidence was adduced by the seller that she rejected the offer 3 days before the contract was delivered to the buyer. The principal issue in the case was whether the defendant had effectively rejected the plaintiff's offer and revoked her acceptance of the offer before the acceptance had been communicated to the plaintiff. In *Pribil* we found that the evidence did not show the acceptance was communicated to the plaintiff and thus became effective before the defendant changed her mind and rejected the offer. Unlike *Pribil*, there was no issue as to whether the plaintiff herein, as part of his prima facie case, proved a communicated acceptance.

The evidence, such as it is, is that the contract on its face was accepted on October 20, 1981, the date it was signed. By producing this contract the buyer established the existence of a binding contract. In 17A C.J.S. *Contracts* § 581 at 1119 (1963), it is said: "A contract is presumed to have been executed on the day of its date." Further, *id.* at 1120, it is said: "Where a written agreement signed by one of the parties is found in the possession of the other party, in the absence of other proof it is presumed to have been duly delivered . . . ." Further, in *Dodd v. Kemnitz*, 74 Neb. 634, 636, 104 N.W. 1069, 1070 (1905), we said: "[T]he possession of a written agreement is *prima facie* evidence only of a delivery."

Unlike *Pribil*, the seller herein produced no affirmative evidence that her rejection occurred before her acceptance was communicated. Who had the burden to prove offer and acceptance versus rejection was never an issue in the *Pribil* case, as disclosed by the briefs filed in this court. For these reasons, the appellant's reliance on *Pribil* is unfounded.

Appellant's second assignment of error is that the district court erred in its judgment dismissing appellant's request for

declaratory relief against third-party defendant Daeges. In support of this contention appellant reasserts her claim as to the validity of the uniform purchase agreement of October 20, 1981. In light of the discussion above, this claim has no merit.

Appellant also asserts a breach of fiduciary duty on the part of third-party defendant Daeges, entitling her to equitable rescission. Our review of equitable actions is by trial de novo. In a trial de novo this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to the rule that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *Schmeckpeper v. Koertje*, 222 Neb. 800, 388 N.W.2d 51 (1986). Having reviewed the record, we find that the trial court properly dismissed appellant's third-party petition, and we affirm.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IMOGENE JONES, APPELLANT, V. JAMES JEFFREY MALLOY, D.C., APPELLEE.

412 N.W.2d 837

Filed September 25, 1987. No. 85-791.

1. **Health Care Providers: Malpractice: Limitations of Actions.** When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
2. **Health Care Providers: Presumptions.** Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
3. **Health Care Providers: Words and Phrases.** Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
4. **Health Care Providers: Informed Consent: Words and Phrases.** Informed

consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

5. **Health Care Providers: Malpractice: Informed Consent.** The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
6. **Health Care Providers: Malpractice: Expert Witnesses: Proof.** Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
7. **Health Care Providers: Malpractice: Informed Consent: Expert Witnesses: Proof.** Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
8. **Health Care Providers: Malpractice: Informed Consent: Proof.** Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
9. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom the motion for a directed verdict is made, the case may not be decided as a matter of law.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas R. Wolff, for appellant.

Joseph F. Bataillon and Robert M. Slovek of Sodoro, Daly & Sodoro, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The plaintiff, Imogene Jones, appeals from the verdict in favor of the defendant, James Jeffrey Malloy, D.C. Her petition alleged two causes of action: first, that Dr. Malloy performed a chiropractic manipulation on her without her consent (battery); and second, that Dr. Malloy negligently failed to inform or explain the risks of the procedure he

performed upon her, resulting in a lack of informed consent. Dr. Malloy moved for and was granted a directed verdict on the battery issue, and the jury decided against the plaintiff on the informed consent issue.

Jones asserts on appeal that the trial court committed five errors warranting reversal: first, that the directed verdict in favor of the defendant on the battery issue (lack of consent) was improper; second, that an instruction on lack of consent was improperly rejected; third, that the court improperly denied the plaintiff one of her theories of recovery; fourth, that the court should have granted the plaintiff's motion for directed verdict on the issue of lack of consent; and fifth, that the court should have granted the plaintiff's motion for directed verdict on the issue of informed consent.

About October 1, 1975, Jones was operated on by Dr. Craig Poindexter for a herniated or ruptured disk in her lower back at the L5-S1 interspace. After rehabilitation she experienced no further back problems until late in 1981, when she suffered shoulder pain related to the waterbed she had recently acquired. This led her to seek Dr. Malloy's services. At this time he took a patient history, was informed of her previous back surgery, and treated her for her shoulder pain. She visited him six more times before her visit in the late morning of September 3, 1982, for treatment for a "crick" in her neck.

Dr. Malloy admitted at trial that "she [Jones] asked me not to work on her low back" and that she would not even permit him to x ray her lower back. Jones' testimony agrees with Dr. Malloy's about her concerns regarding her lower back, but thereafter the testimony from the two parties differs.

According to Jones, Dr. Malloy had never touched her lower back in the course of the treatments for her shoulder and neck pain until September 3, 1982. On that day he was treating her upper back, as he usually did, when suddenly he pressed sharply with the heels of his hands on her lower back. Jones compared the sensation as similar to being struck. She cried out in pain and arose from the treatment table. After receiving assurances from Dr. Malloy that he would manipulate only her neck, she again lay on the table. Dr. Malloy treated her neck without further incident, and Jones left, still in pain, for an

appointment she had in her capacity as a Mary Kay Cosmetics consultant. The pain worsened and ultimately resulted in surgery in Texas on March 28, 1983.

Dr. Malloy testified that he has never treated Jones' lower back. His practice was to palpate the spine, using a series of tests to look for imbalances, each time she would come into the office. He checked her pelvis each visit for signs of imbalance, and during the September 3, 1982, visit, the tests he performed, which involved touching her pelvis, revealed an alignment problem, an apparent posterior inferior rotation of the right ilium in relationship to the left. After testing her, he stated, "I'm going to manipulate your pelvis." Jones made no response. When he palpated her pelvis with his hand to locate the contact point where the tissue attaches, she reported tenderness but no sharp pain, which was to be expected due to the misalignment. He thrust downward to correct the position of the ilium. No change resulted, so he repeated the procedure from the other side. After four manipulations he achieved some correction, but did not proceed with other types of treatment due to her prohibition against working on her lower back.

Dr. Malloy testified that throughout the manipulations Jones never reported pain or told him to stop and that he would have stopped if she had requested it of him. After he manipulated her neck, she left the office. She called back several hours later, complaining of pain.

The table upon which Jones lay was designed to move so that when he thrust with his hand on her pelvis, the table would drop and the contact points move with a minimum of force or risk. Dr. Malloy testified that the manipulation presented no significant risks and that the risk to her was no greater because of her surgery than to the average patient. He manipulated the ilia at the sacroiliac joint which, for Jones, was 1 to 2 inches away from the lower back, or L5-S1 area, where she had had surgery. He contends that the area he manipulated is not part of the lower back.

Only one doctor of chiropractic, other than the defendant, testified as to the standard of care for chiropractors in the State of Nebraska. Dr. Michael Mueller testified that the pelvis is not considered to be part of the lower back and that, in his opinion,

he would feel authorized to adjust a patient's neck, thoracic, and pelvic areas, even if told not to treat the lower back. He further opined that the manipulation performed on Jones by Dr. Malloy was unlikely to rotate or to affect her lower back. He felt the risk posed by the manipulation to be insignificant and stated that the failure to discuss the risks did not violate the standard of care required in this situation. He also responded to Jones' allegation that Dr. Malloy had never touched her lower back before he suddenly came down hard across her lower back by saying that no chiropractor would thrust down upon an area with his hand without palpating the area first.

The parties called several orthopedic and neurological surgeons to the stand to testify on the issues of causation and damages. The diagnosis concurred upon is that the pain is due to a pinched nerve at the site of the previous surgery due to lateral recessed stenosis (narrowing) at the nerve root at the L5-S1 area. The opinions differ as to the cause of this problem, creating an issue of fact. Some testimony links it to the manipulation, while some considered the problem a consequence over time of the previous surgery, complicated by natural degenerative wear and tear and arthritic spurring and, therefore, not caused by the manipulation. Whether the manipulation or the packed bags of Mary Kay wares carried by Jones in her job caused the symptom to flare was also at issue, as was the amount of damages.

Appellant's first four assignments of error relate to the issue of initial consent to treatment. The district court sustained defendant's motion for directed verdict on this issue.

Appellant first argues that the district court erred because it based its ruling on an inapplicable statute of limitations. Plaintiff's amended petition alleged that defendant's failure to obtain consent to perform treatment to the lower back area constituted a battery. The argument presented by defendant in furtherance of the motion for a directed verdict asserted that the statute of limitations had run as to battery. Neb. Rev. Stat. § 25-208 (Reissue 1985) provides that an action for battery must be brought within 1 year and an action for malpractice must be brought within 2 years. The plaintiff's first petition was filed 1 year 3 months 3 days after the treatment in question occurred.

The record does not give a clear indication as to the basis for the trial judge's decision on the directed verdict. Immediately preceding the ruling defendant argued that the motion was based on the fact that the statute of limitations had run as to battery. If this was the basis of the district court's decision, we hold that the court was in error; however, in this case the error was harmless. Medical treatment is invariably performed in good faith for the patient's benefit, and not for antisocial reasons. Further, it is the failure to obtain adequate consent, which is usually an unintentional omission, that is the grounds for the complaint, rather than an intentionally injurious act. *Trogun v. Fruchtman*, 58 Wis. 2d 569, 207 N.W.2d 297 (1973). The identical claim was submitted in the malpractice action.

Requiring consent to treatment is more a recognition of a patient's right to self-determination than a preventative of battery or right to be free from contact. We hold that when an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.

This is not to say that plaintiff was denied an action based on lack of initial consent to treatment. We begin with the proposition that consent to treatment will be presumed, in the absence of fraud or misrepresentation. *Mosslander v. Armstrong*, 90 Neb. 774, 134 N.W. 922 (1912). As a practical matter, health professionals cannot be required to obtain express consent before each touch or test they perform on a patient. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment. *Banks v Wittenberg*, 82 Mich. App. 274, 266 N.W.2d 788 (1978).

Appellant nowhere alleges that she gave no consent to be treated by Dr. Malloy, nor does she allege fraud or misrepresentation. It can be implied that appellant consented to treatment by Dr. Malloy by her voluntary act of seeking such treatment. The question of whether Dr. Malloy overstepped the bounds of that initial consent by failing to inform his patient of the risks associated with manipulation of her pelvis is an issue of negligence analyzed according to his duty of disclosure under the circumstances in this case. It is an issue of informed

consent.

In this case, even if the district court erroneously directed a verdict on the issue of initial consent to treatment (battery) based on a view that the battery statute of limitations had run, there was no prejudice to plaintiff's case. The basis for the plaintiff's malpractice claim was grounded in the law of informed consent. The trial court was not required to instruct the jury on a battery/lack of consent theory. The first four assignments of error are without merit.

Appellant's fifth assignment of error states that the district court should have granted her motion for directed verdict on the issue of informed consent. Based on the following analysis, we hold that plaintiff's motion for a directed verdict was properly overruled on the issue of informed consent.

The Legislature has defined informed consent within the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2816 (Reissue 1984), as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

It is clear that the provisions of Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1984) apply only to those health care providers who "qualify" under the act. In this case involving a chiropractor, the act apparently does not apply. To begin with, the appellee does not plead the protection of the act. Further, after review of the legislative history of the act, it is at best ambiguous as to whether it would apply to chiropractors, even if they attempted to qualify thereunder.

However, this court believes that the informed consent language contained within §§ 44-2816 and 44-2820 correctly and accurately reflects the majority view of the law in this

country today. The majority of states adhere to the "professional" theory of the nature of a physician's duty of disclosure in informed consent cases. See, Studer, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions*, 48 Mont. L. Rev. 85 (1987); 61 Am. Jur. 2d *Physicians, Surgeons, etc.* § 188 (1981). This court recently held that Nebraska, through its Legislature, has committed to such a "professional" theory in malpractice cases based on lack of informed consent. *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987). For the sake of uniformity of law and given that this theory is the majority view, we choose to adopt the language of §§ 44-2816 and 44-2820 for purposes of malpractice actions against chiropractors. Other jurisdictions have likewise held that the rules of law pertaining to medical malpractice, including informed consent, apply to chiropractors as they would to physicians. *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984); *Bakewell v. Kahle*, 125 Mont. 89, 232 P.2d 127 (1951); *Hartfiel v. Owen*, 618 S.W.2d 902 (Tex. Civ. App. 1981).

The principal issue in this case is whether Dr. Malloy was negligent based on a breach of his duty to disclose the risks inherent in manipulating plaintiff's pelvis in light of her admonition regarding her lower back. The extent of Dr. Malloy's duty must be measured against what information other chiropractors in the locality or in similar localities would have ordinarily provided under like circumstances. On several occasions this court has held that whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony. *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987). Such expert testimony is also required for informed consent cases as to the standard of care for a particular profession. *Smith v. Weaver, supra*. In addition,

> Before the plaintiff may recover any damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she

been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

§ 44-2820.

At trial plaintiff presented expert chiropractic evidence from Dr. Mueller as to the proper standard of care. In addition, numerous orthopedic and neurological surgeons testified as to causation and damages. All of this evidence created issues of fact that only the trier of fact could determine. If there is any evidence which will sustain a finding for the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law. *Lambelet v. Novak*, 225 Neb. 229, 404 N.W.2d 28 (1987).

The proper standard of care and duty of disclosure, the issue of causation, and the extent of damages were all questions for the jury after hearing the testimony in this trial. Plaintiff's motion for a directed verdict on the issue of informed consent was properly overruled.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RICHARD R. DUFF, JR., APPELLANT.

412 N.W.2d 843

Filed September 25, 1987. No. 86-880.

1. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
2. _____: _____. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
3. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given,

and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

4. **Search Warrants: Affidavits: Presumptions.** An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
5. **Search Warrants: Probable Cause: Appeal and Error.** In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Donald W. Kleine of Kleine Law Office, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

After a trial to the court, the defendant, Richard R. Duff, Jr., was convicted of second degree murder and use of a firearm in the commission of a felony. He was sentenced to imprisonment for 12 years on the murder count and 3 to 5 years for use of a weapon, the sentences to run consecutively. The defendant has appealed and contends that his motion to suppress evidence seized in a search pursuant to warrant should have been sustained and that the evidence is not sufficient to support the finding of guilty.

The record shows that on February 8, 1985, the defendant, his girlfriend, Beverly Hill, and a male friend, Robert Winston, proceeded to the Bali-Hi Lounge at 24th and Hamilton Streets in Omaha, Nebraska. They found seats at the bar and began drinking alcoholic beverages. After approximately 10 or 15 minutes, the defendant walked over to the entrance of the lounge, where he came into contact with the victim, Edward Hughes. The defendant and the victim then engaged in conversation.

The defendant testified that the conversation involved drugs and that the victim was attempting to locate a "set," known as

Ritalin and Talwin. The defendant and the victim walked outside the lounge so that the proprietor of the Bali-Hi would not hear the conversation. Once outside, the defendant claims that he was struck by the victim, Hughes, and two other men known to the defendant as Red and Truman. According to Duff, Red displayed a pistol. When Duff saw the pistol, he drew his own pistol. Duff admitted that he often carried the gun because he feared he would meet with "this particular person" who had made previous threats to Duff.

The defendant described his pistol as a .38-caliber semiautomatic which was loaded. After drawing his gun, the defendant fired a shot. Red then fired a shot, and the defendant fired a second shot. While the defendant fired four additional shots, Red, Truman, and Hughes attempted to enter the package portion of the lounge. One shot was fired by the defendant from the middle of the street in front of the Bali-Hi, and two were fired from the sidewalk across the street from the Bali-Hi.

Beverly Hill testified that she left the lounge after being told by the bar owner to "go outside and see about Richard." She saw the defendant standing across the street from the lounge, yelling at someone across the street from him. She joined the defendant, and together they walked away from the Bali-Hi toward her aunt's home.

Officer Felends Marion was called to the scene. When he entered the package-store portion of the Bali-Hi he found the victim lying on the floor in the rear of the store, suffering from gunshot wounds. Rescue personnel arrived and took the victim to a hospital, where he died from the wounds.

On February 15, 1985, the defendant was arrested. On the same day, a search warrant was obtained for 1615 Spencer Street, the defendant's residence. Various drug paraphernalia, spent shell casings, personal papers, and ammunition were seized during the search at 1615 Spencer Street.

The defendant moved to suppress all evidence seized at 1615 Spencer Street, alleging that the supporting affidavit lacked probable cause, contained incorrect and false information, and was procured in bad faith. The motion was overruled on February 14, 1986.

The defendant contends that the affidavit which was the basis for the search warrant failed to establish probable cause because it was based upon hearsay, did not contain a factual basis upon which the reliability of the informants' statements could be determined, and did not contain a factual basis for the affiant's belief in the credibility of the informants.

The affidavit contained a summary of the facts the police had discovered from their investigation of the shooting. The police knew that the victim had been killed by rounds fired from a .38-caliber handgun. The purpose of the search was to find the weapon and similar ammunition. Several eyewitnesses had observed the defendant at the scene, firing a gun in the direction of the Bali-Hi Lounge. The defendant had admitted to the police that he was at the scene of the crime at the time of the shooting and had talked with the victim, but denied having a gun in his possession at that time and denied that he had shot the victim.

The statements of the eyewitnesses tended to corroborate each other and, to some extent, were corroborated by the statements of the defendant to the police.

In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. *Arnold, supra*. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Arnold, supra; Gates, supra*.

In *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352

(1978), we held: "An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable." *State v. King*, 207 Neb. 270, 298 N.W.2d 168 (1980). See, also, *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983). In determining whether or not an individual is a citizen informant, *Payne* requires that the "affidavit affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred." 201 Neb. at 670, 271 N.W.2d at 353. A citizen informant has been defined as

> "a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. [Citations.] It is reasonable for police officers to act upon the reports of such an observer of criminal activity. [Citations.] [¶] A 'citizen-informant' is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct. [Citations.] Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as 'citizen-informants' because they are generally motivated by something other than good citizenship. [Citations.]"

People v. Smith, 17 Cal. 3d 845, 850-51, 553 P.2d 557, 560, 132 Cal. Rptr. 397, 400 (1976), citing *People v. Schulle*, 51 Cal. App. 3d 809, 124 Cal. Rptr. 585 (1975).

Once an individual is considered to be a citizen informant,

> " 'Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause.' . . . 'Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.' "

State v. Ybanez, 210 Neb. 42, 44, 313 N.W.2d 30, 32 (1981), citing *State v. King, supra*. Courts are willing to find citizen

informants reliable because such individuals generally have no motive to falsify. *United States v. Ross*, 713 F.2d 389 (8th Cir. 1983); *United States v. Gagnon*, 635 F.2d 766 (10th Cir. 1980), *cert. denied* 451 U.S. 1018, 101 S. Ct. 3008, 69 L. Ed. 2d 390 (1981).

In *Illinois v. Gates, supra*, the U.S. Supreme Court abandoned the "two-pronged" test, known as the *Aguilar-Spinelli* test, and adopted a more liberal "totality of the circumstances" approach. This approach does not disregard the informant's reliability, veracity, or basis of knowledge, but instead, it allows these factors to be considered as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." 462 U.S. at 230. The adoption of this more flexible approach requires a practical rather than technical analysis of probable cause:

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

462 U.S. at 231-32, citing *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

In the *Gates* case, the U.S. Supreme Court set forth the standard by which to review the sufficiency of the affidavit:

> [A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli, supra*, at 419. "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca*, 380 U.S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting

> affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109.
>
> . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271 (1960).

Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Shortly after the *Gates* decision, the U.S. Supreme Court further clarified the intent and the effect of its holding in *Gates*: "We did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Massachusetts v. Upton*, 466 U.S. 727, 732, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984), citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

This court has adopted the "totality of the circumstances" rule established by *Gates*. *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983); *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983). Under this standard, the question is whether, under the totality of the circumstances, the issuing magistrate had a "substantial basis" for his finding that the affidavit established probable cause.

The appellant's primary assertion is that the information obtained from the witnesses and contained in the affidavit lacked proof of reliability or credibility. Pursuant to *Gates* and *Upton*, these facts do not require independent proof.

The affidavit involved in this case permits an inference that all four witnesses were citizen informants, and not police tipsters or professional informants. Each witness related that he or she was in the area of 24th and Hamilton at the time of the shooting. Witness No. 1 resided in the area and witnessed the shooting. Witness No. 2 and witness No. 3 also witnessed the event. Witness No. 4 was in the area visiting his uncle, witness

No. 1, when he observed the incident. There is nothing in the affidavit to suggest that the witnesses were anything but eyewitnesses, and thus citizen informants. They all related personal observations, not rumor or speculation. While the identities of the witnesses were not disclosed to the magistrate, their identities were known to the affiant officer. Lack of identification is not fatal to the validity of the affidavit because the credibility of each witness could be inferred from the specificity of their recollections of the events of February 8, 1985. The fact that each witness' report of the incidents of February 8 corroborates generally the reports of the other witnesses lends strong support for the credibility of the information contained in the affidavit. We have held that "[c]onstitutional policy demands that doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *State v. Payne*, 201 Neb. 665, 671, 271 N.W.2d 350, 353 (1978). Also, great deference should be paid to the issuing magistrate's determination of probable cause. *Illinois v. Gates, supra*, citing *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Viewing the affidavit under the "totality of the circumstances" approach, we conclude that the issuing magistrate had a substantial basis on which to find probable cause. The evidence seized pursuant to the search was admissible.

The second assignment of error alleges that the evidence was insufficient to support appellant's conviction.

> [I]t is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.

State v. Nesbitt, ante p. 32, 39-40, 409 N.W.2d 314, 318-19 (1987). See, also, *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

The evidence of the State, if believed, was sufficient to prove

that the defendant was at the Bali-Hi Lounge on February 8, 1985, at approximately 10:30 p.m., and that he engaged in a dispute with the decedent, drew his gun, and fired numerous shots, one of which fatally injured the victim.

The defendant testified and admitted that he was carrying a gun on February 8, 1985, that he was involved in a dispute with the victim, and that he fired his gun numerous times in the vicinity of the Bali-Hi Lounge.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN H. REED, APPELLANT.
412 N.W.2d 848

Filed September 25, 1987. No. 86-888.

Jurisdiction: Appeal and Error. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Appeal dismissed.

John H. Reed, pro se.

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Defendant, John H. Reed, appeals from the order of the district court for Douglas County denying his postconviction motion to vacate sentence. We dismiss the appeal.

Defendant filed his petition for postconviction relief on September 12, 1986. On September 16 the district court entered its order denying the relief requested. Defendant filed his notice of intent to appeal on October 22, 1986, some 36 days after the entry of the court's order.

Neb. Rev. Stat. § 25-1912(1) (Reissue 1985) requires that proceedings to obtain a reversal, vacation, or modification of final orders made by the district court shall be by filing in the office of the clerk of the district court within 1 month after the rendition of such final order, or within 1 month from the overruling of a motion for a new trial, a notice of intention to prosecute such appeal. Defendant filed his notice of intent to appeal more than 1 month after the entry of the order denying the relief sought in his petition for postconviction relief.

We have held that it is the settled law of this State that where a notice of appeal was not filed within 1 month, as required by § 25-1912(1), this court obtains no jurisdiction, and the appeal must be dismissed. *State v. Harrington*, 214 Neb. 696, 335 N.W.2d 316 (1983). Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. MARK S. MILLER, APPELLANT.

412 N.W.2d 849

Filed September 25, 1987. No. 86-1042.

1. **Constitutional Law: Jury Trials.** There is a constitutional right to a jury trial for offenses providing for a sentence of incarceration of more than 6 months.
2. **Jury Trials.** A demand for a jury trial by a defendant is necessary to invoke the statutory right to a jury trial.
3. **Circumstantial Evidence: Drunk Driving.** Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
4. **Sentences: Appeal and Error.** Absent an abuse of discretion, this court will not reduce a sentence imposed by a trial court if the sentence is within statutory limits.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

George A. Sutera of Sutera & Sutera, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

After a trial to the county court for Sarpy County sitting without a jury, defendant, Mark S. Miller, was found guilty of operating or being in actual physical control of a motor vehicle in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). After an enhancement hearing at which the State proved that defendant had twice before been convicted of the same charge and had had counsel during each such conviction, defendant was sentenced to 91 days in the Sarpy County jail and ordered to pay a fine of $500. The court also suspended his driver's license for 15 years. Defendant appealed to the Sarpy County District Court, where his sentence was affirmed. Defendant has appealed to this court, assigning as error that the trial court erred (1) in not advising defendant that he had a right to a jury trial, since the record does not show that defendant waived that right; (2) in finding defendant guilty, when the evidence was insufficient to prove his guilt; (3) in permitting the State, at trial, to inquire into defendant's felony and misdemeanor record; and (4) in abusing its discretion in imposing too severe a sentence. We affirm.

The record shows that on April 9, 1986, Nancy Smith was driving on a rural road from Springfield, Nebraska, to her home in Papillion, Nebraska. After she reached the crest of a hill, she observed the defendant's truck stopped sideways in the road, blocking the traffic. Unable to stop her car in time, she struck the defendant's vehicle. After the impact, her own vehicle was nosed under the defendant's truck. She sustained no serious injuries. She called out to see if anyone had been injured. In response, the defendant climbed out of his truck. Smith testified that the defendant was the sole occupant of the vehicle. After observing that the defendant had a "glassy look" in his eyes, Smith left to summon the police. She then returned to the scene of the accident.

Larry Fasnacht, deputy with the Sarpy County Sheriff's Department, was dispatched to investigate the accident. When he arrived at the scene of the accident, a rescue squad had already arrived and was administering aid to the defendant.

Upon questioning by Deputy Fasnacht, the defendant contended that he had been a passenger in the vehicle at the time of the accident and that the driver of the vehicle had fled the scene immediately after the accident. The defendant, however, gave conflicting accounts as to the identity of the driver. A 15- to 20-minute search for the driver had been conducted by the rescue squad. Although one squad member reported that he had seen "something that was about 6 foot and it was gray" in a nearby field, no other person was found.

The defendant was subsequently placed under arrest for driving while under the influence of alcohol and transported to Sarpy County jail. An Intoxilyzer test was administered, which revealed that the defendant's blood alcohol content was .236 percent.

The defendant assigns as error the county court's failure to advise him that he had a right to a jury trial, when the record does not reveal that the defendant waived this right. Defendant contends that the consequences of a third-offense conviction for driving while under the influence entitle him to a constitutionally protected right to a jury trial. There is a constitutional right to a jury trial for a serious offense, which is an offense providing for a sentence of incarceration of more than 6 months. *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987). Although the right to a jury trial may be waived, the waiver must be express and intelligent, and cannot be presumed from a silent record. *State v. Bishop, supra; State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985). Section 39-669.07(3) provides that a person convicted of third-offense driving while under the influence is guilty of a Class W misdemeanor. The maximum punishment for a Class W misdemeanor is 6 months' imprisonment and a $500 fine. This assignment of error is without merit. The charge is not a serious offense for which there is a constitutionally protected right to a jury trial.

The defendant, however, had a statutory right to a jury trial, pursuant to Neb. Rev. Stat. § 24-536 (Reissue 1985). That section provides that a jury trial in county court may be demanded by either party in any case except certain traffic

infractions and criminal cases involving city or village ordinances. A demand, however, is required to invoke this statutory right. *State v. Lafler*, 224 Neb. 613, 399 N.W.2d 808 (1987); *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). Unless a timely request is made, this right is waived. *State v. Lafler, supra*. The record fails to reflect that a demand for a jury trial was ever made. Thus, the defendant waived his statutory right to a jury trial, since it was the defendant's duty to make such a request if he desired such a trial.

Defendant also assigns as error the county court's finding that the defendant was in actual physical control of his vehicle, pursuant to § 39-669.07. The evidence in this case is largely circumstantial. We have held that circumstantial evidence may be used to support a conviction where the evidence as a whole establishes guilt beyond a reasonable doubt. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986). This court has held that circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of § 39-669.07. *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986). In the *Baker* case, this court, in response to a similar contention, held that there was sufficient circumstantial evidence to establish guilt beyond a reasonable doubt. In *Baker, supra*, the evidence revealed that the defendant was the sole occupant of the vehicle and was asleep in his parked vehicle when discovered by the deputy sheriff. The deputy sheriff awakened the defendant and noted that the defendant had a strong smell of alcohol on his breath and his speech was slurred. The defendant alleged that he was not operating a motor vehicle because the vehicle was parked where he was found by the deputy sheriff, the defendant was asleep, and the motor was not running. This court held that there was sufficient circumstantial evidence to convict the defendant, pursuant to § 39-669.07.

In the instant case, while there was evidence to the contrary, there was sufficient evidence presented by the State from which the trial court could find that the defendant was operating or was in physical control of a motor vehicle while under the influence of intoxicating liquor. The defendant was the sole occupant of the vehicle, and the vehicle was not moving. The defendant stated that he had no clear recollection of the events

leading up to the accident. From the evidence, the trial court could find that the guilt of the defendant had been established beyond a reasonable doubt.

Defendant also contends that the county court erred in permitting the State to inquire into the defendant's felony and misdemeanor record at trial. This argument is without merit. Neb. Rev. Stat. § 27-609 (Reissue 1985) provides that during cross-examination, for the purpose of attacking the credibility of a witness, evidence may be elicited that the witness has been convicted of a felony or of a misdemeanor involving dishonesty or false statement. We have held that when a defendant in a criminal case takes the stand on his own behalf, the defendant is subject to the same rules of cross-examination as any other witness. *State v. Pitts*, 212 Neb. 295, 322 N.W.2d 443 (1982).

In his final assignment of error, the defendant contends that the county court abused its discretion in imposing too severe a sentence. Absent an abuse of discretion, this court will not reduce the sentence imposed by the trial court if the sentence is within the statutory limits. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986); *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985). The presentence report revealed that the defendant had been arrested 10 times for driving while under the influence, with 5 of those arrests resulting in convictions. At the enhancement hearing, the State proved that the defendant had two prior convictions of the same offense. The crime of third-offense driving while under the influence is a Class W misdemeanor, for which the maximum punishment is 6 months' imprisonment and a $500 fine. The minimum sentence is 3 months' imprisonment and a $500 fine. Furthermore, § 39-669.07(3) provides that, as part of the sentence, the driver's license of the third offender shall be revoked for a period of 15 years. The defendant was sentenced to 91 days in jail and a $500 fine, and his driver's license was suspended for a period of 15 years. The sentence imposed was clearly within the statutory limits. We hold that the county court did not abuse its discretion in imposing the sentence. The judgment and sentence of the lower court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. MATZ, APPELLANT.

412 N.W.2d 852

Filed September 25, 1987. No. 87-046.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Convictions: Circumstantial Evidence.** A person charged with a crime may be convicted on circumstantial evidence only.
3. **Burglary: Intent.** An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
4. _____: _____. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
5. _____: _____. Burglary does not require an actual theft or asportation of property.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Avis R. Andrews, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant, James A. Matz, was convicted of two counts of attempted burglary and was sentenced to imprisonment for 20 months to 5 years on each count, the sentences to run concurrently. He has appealed and contends the evidence was insufficient to support the finding of guilty on each count.

The charges grew out of break-ins at Tidy Car and Victory Lake Marine, two businesses in Fremont, Nebraska, which share a common building. The record shows that when Vern Sukstorf, who operates Tidy Car, reported for work on the morning of July 29, 1986, he found splatters of blood on the inside floor, as well as two broken windows on the rear of the

building. Additionally, he noticed a trail of blood from both broken windows, leading to his front office. The trail of blood approached his desk but stopped 4 to 5 feet in front of the desk. Sukstorf found no contents missing from his store.

Ron Vlach, who operates Victory Lake Marine, found a broken window at the rear of his business. The window was part of a garage door and was located just above the lock assembly of the door. Vlach noticed a large amount of blood both on the outside of and the inside of the garage door, as well as on the locking mechanism. Vlach followed a trail of blood from the broken garage window about 100 feet to where another window was broken. Vlach found no contents missing from his building.

The trail of blood led through a parking lot to apartment No. 11 in an apartment complex. Tammy Patten, who lives in apartment No. 11, testified that sometime after midnight on July 29, 1986, the defendant came to her door, holding his hand and wearing a bloodstained shirt. The defendant was looking for "Jim," who lived in apartment No. 12. Matz left without incident.

Within a week of the incident, Patten identified the defendant in a photo lineup as the man looking for "Jim."

When the defendant was observed on August 6, 1986, following his arrest, he had a large laceration in the web of his left hand, between his thumb and the forefinger.

Steven Tellatin, a Fremont detective sergeant who assisted with the investigation of the break-ins, found a tire iron, screwdriver, potato chip sack, and glass fragments near the building, all stained with blood.

An expert witness testified that a comparison of blood samples found at the scene of the crime with samples obtained from the defendant disclosed that only .04 percent of the population had blood of the same type and with the same "genetic markers." This analysis excluded 99.96 percent of the population as suspects.

The defendant contends the evidence was not sufficient to establish that he intended to commit any felony or steal any property of value, as required by Neb. Rev. Stat. § 28-507 (Reissue 1985).

> [I]n determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.

State v. Jacobs, ante p. 184, 194, 410 N.W.2d 468, 475 (1987); *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987).

Although much of the evidence was circumstantial, a person charged with a crime may be convicted on circumstantial evidence only. *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979), citing *State v. Ohler*, 178 Neb. 596, 134 N.W.2d 265 (1965).

> It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

State v. Meadows, supra at 199, 277 N.W.2d at 708.

An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate. *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987); *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984). Nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). In the *Tomrdle* case at 583, 335 N.W.2d at 282, we cited *Hebb v. State*, 10 Md. App. 145, 268 A.2d 578 (1970): " 'The attempt by the appellants to enter a storehouse (which they knew carried a substantial inventory) in the nighttime . . . was sufficient to support a rational inference that they intended to steal everything of value that they could find and carry away.' "

In *Mirich v. State*, 593 P.2d 590, 593 (Wyo. 1979), the court said:

> The law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny. A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal. . . .
>
> . . . Defendant had been in the building and knew its contents. Knowledge of what a structure contains, coupled with an attempt to enter it, supports a rational inference of intent to steal whatever is of value within the building.

Burglary does not require an actual theft or asportation of property. *State v. Vaughn, supra; State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980).

In *State v. McNair*, 719 S.W.2d 113, 114 (Mo. App. 1986), the court held that "evidence that a person broke into a building which contains merchandise is sufficient for the trier of fact to find that the breaking was done with intent to steal."

In *People v. Sehr,* 150 Ill. App. 3d 118, 122, 501 N.E.2d 848, 851 (1986), the court cited *The People v. Johnson,* 28 Ill. 2d 441, 192 N.E.2d 864 (1963), for the proposition:

> "Intent must ordinarily be proved circumstantially, by inferences drawn from conduct appraised in its factual environment. We are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose."

The *Sehr* court also held, on its own facts:

> We find the fact that nothing was taken or even disturbed in the Jagiello residence has little redemptive value. The defendant was apparently only in the house for a short time before he was discovered. The basement contained rather large items such as sleeping bags, lawn furniture

> and so forth, and the first bedroom the defendant entered was a combination junkroom/weight-training room. It would appear that neither room contained the type of small valuable items which could be most easily carried away by a person afoot.

150 Ill. App. 3d at 123-24, 501 N.E.2d at 852.

The jury could find from the evidence of the State in this case that the defendant made forcible and unauthorized entries into the building during the nighttime hours of July 28 or early morning hours of July 29, 1986; the building contained items of value; the screwdriver and tire iron found near the premises were covered with his blood; and there was no evidence to explain his unauthorized presence on the premises. This evidence was sufficient to support a finding of guilty beyond a reasonable doubt on each count.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ERNEST H. ADDISON, RESPONDENT.

412 N.W.2d 855

Filed September 25, 1987. No. 87-201.

Original action. Judgment of suspension.

BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original disciplinary proceeding brought against Ernest H. Addison, a lawyer duly admitted and licensed to practice law in this state.

A formal charge against Addison was filed in this court on March 11, 1987, alleging his violation of Canon 1, DR 1-102(A)(1), (4), (5), and (6), and Canon 7, DR 7-102(A)(5), of

the Code of Professional Responsibility.

The referee appointed herein held a hearing on the matter, filed his report with findings of fact and conclusions of law, and has recommended that the court suspend the respondent from the practice of law for a period of 6 months.

It appears from the record that the charge in question arose out of an action filed in the district court for Douglas County, Nebraska, on behalf of plaintiff Joseph Medina. Medina had retained another attorney and respondent, Ernest Addison, to represent him in connection with injuries he sustained in an automobile accident that occurred in Omaha, Nebraska, on January 12, 1985. Medina was injured when a vehicle driven by Michael John Kozal collided with another vehicle driven by Susan Teresa Miyeno, which in turn struck Medina, a pedestrian at the time. As a result of the accident Medina was hospitalized at the Lutheran Medical Center in Omaha, Nebraska, and incurred expenses there totaling approximately $112,836.36. Kozal was insured by State Farm Automobile Insurance Company, with a policy limit of $100,000, and also by Sea Insurance Company, Ltd., with an umbrella liability policy having a limit of $1 million. Miyeno had a liability insurance policy with Allstate Insurance Company, having a limit of $50,000.

On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for $45,000 of the State Farm settlement of $100,000, and an additional $15,000 if and when Medina settled with Allstate, plus another $5,000 if the settlement proceeds from Allstate exceeded $40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained

by fraudulent misrepresentations made by respondent Addison.

In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).

Based upon the violations in this action and in light of the fact that respondent has previously been reprimanded by this court, *State ex rel. Nebraska State Bar Assn. v. Addison & Levy*, 198 Neb. 61, 251 N.W.2d 717 (1977), the referee recommended that respondent be suspended from the practice of law for a period of 6 months. Thereafter, the respondent filed a conditional admission with this court, acknowledging that his conduct constitutes a violation of DR 1-102(A)(1) and (4).

We believe that the referee was correct in his findings of fact and law and that the recommendation and consent thereto was proper. Accordingly, we enter a judgment of suspension for 6 months, said suspension to commence on December 1, 1987.

JUDGMENT OF SUSPENSION.

ROBERT F. CRAIG, TRUSTEE OF CASSIDY LAND & CATTLE COMPANY, INC., APPELLEE, V. LYNDA CASSIDY TAYLOR LOGEMANN, INDIVIDUALLY AND AS TRUSTEE OF THE MCCARTY RANCH TRUST, APPELLANT, WILLIAM LOGEMANN, INDIVIDUALLY AND DOING BUSINESS AS W.S. CATTLE COMPANY, ET AL., APPELLEES.

412 N.W.2d 857

Filed September 25, 1987. No. 87-451.

Constitutional Law: Courts: Jurisdiction. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

William J. Rieb, for appellant.

David D. Begley of Kennedy, Holland, DeLacy & Svoboda, for appellee Craig.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from an order of the district court for Garfield County quieting title to a tract of land in Garfield County, Nebraska. The plaintiff below purchased the land at a foreclosure sale pursuant to proceedings conducted in the U.S. Bankruptcy Court for the District of Nebraska.

The factual situation is not complicated. Cassidy Land & Cattle Company, Inc., owned a 12,000-acre ranch, encumbered by a first mortgage in favor of Businessmen's Assurance Company. Severe financial difficulties arose in the operation of the ranch, resulting in large operating losses. Cassidy Land & Cattle Company conveyed the ranch to McCarty Ranch Trust and carried back a mortgage in excess of $2 million. Cassidy Land & Cattle Company was declared bankrupt by virtue of a petition filed in the bankruptcy court. Thereafter, the trustee filed an action to foreclose the mortgage in the U.S. District Court for the District of Nebraska. The action was referred to the bankruptcy court by the U.S. District Court.

At the foreclosure sale the bankruptcy trustee purchased the land. The sale was confirmed on August 19, 1986. At this point a number of documents had been filed in the office of the register of deeds in Garfield County sufficient, in the judgment of the trustee, to create a cloud on the trustee's title. The trial court sustained the trustee's motions for summary judgment, and the defendant Lynda Cassidy Taylor Logemann, individually and as trustee for McCarty Ranch Trust, appeals.

A number of issues are raised, but throughout this action only one question is presented: Does the bankruptcy court have jurisdiction to entertain an action for, and to foreclose, a real estate mortgage?

We first recognize that the U.S. Constitution and laws made pursuant to its authority are the supreme law of the land and that conflicting state laws cannot interfere with the operation of federal law. U.S. Const. art. VI.

The U.S. Constitution provides: "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8. The U.S. Bankruptcy Court and the U.S. District Court for the District of Nebraska have determined that the bankruptcy court had jurisdiction to entertain the foreclosure proceedings.

As this court said in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 495, 62 N.W. 899, 910 (1895), "It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action. (*Freeman v. Howe*, 24 How. [U.S.], 459.)"

The judgment of the district court is accordingly affirmed.

AFFIRMED.

ROBERT HROCH, APPELLANT, V. CITY OF OMAHA, APPELLEE.

413 N.W.2d 287

Filed October 2, 1987. No. 86-005.

1. **Administrative Law: Evidence: Appeal and Error.** In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
2. **Constitutional Law: Due Process: Notice.** The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

John W. Steele of Schumacher & Gilroy, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Allen L. Morrow, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

This was a proceeding in error brought by Robert Hroch to review the order of the city council of the City of Omaha, Nebraska, affirming the order of the housing division of the housing and community development department of the city declaring the building at 1906 Cuming Street to be a nuisance and directing the owner of the property, the plaintiff in error, Hroch, to cause the building to be torn down and removed.

The trial court found that the order should be affirmed. The plaintiff has appealed.

In *Goldsberry v. City of Omaha*, 181 Neb. 823, 151 N.W.2d 329 (1967), the authority of a city of the metropolitan class to remove or order the removal of a dangerous building which has become a nuisance because of its condition was recognized.

The plaintiff contends that the order of condemnation is not supported by the evidence, that the procedures followed by the city denied him due process of law, and that the city exceeded the scope of the authority vested in it by the Legislature.

The record shows that the plaintiff has owned the property since 1975. In 1978 or 1979 the building was damaged by fire and has been in a state of disrepair continuously since that time. At the hearing before the council the plaintiff stated that he had not repaired the building because he had insufficient funds to do so.

The reports of inspection show that the building is not secured and is frequented by transients. Approximately 20 percent of the roof is uncovered and open. All of the window glass is broken out, five floor joists are charred, the rear wall is cracked, the second floor roof is 100 percent fire damaged, and all plumbing fixtures have been removed. Transients who enter

the building for shelter build fires which constitute a hazard and danger to adjoining property.

In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. *First Nat. Bank & Trust Co. v. Ley*, 182 Neb. 164, 153 N.W.2d 743 (1967). Competent evidence in such a case means evidence that tends to establish the fact in issue. *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975).

The evidence which was before the council was sufficient to support its finding that the order of condemnation should be affirmed.

The plaintiff's primary contention that he was denied due process of law centers around his claim that he did not receive notice of the hearing before the director of the housing and community development department. The record does not show that a notice as required by the ordinances of the city was sent to the plaintiff. However, under the circumstances in this case, that defect does not affect the validity of the proceeding.

The ordinance provides that the property owner may appeal to the city council within 15 days. In this case the plaintiff perfected an appeal to the council, which hears "the testimony of the objectors and the director of the housing and community development department and other interested parties." Omaha Mun. Code, ch. 43, art. II, § 43-125 (1982).

> " '* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.'. . ."

Webber v. City of Scottsbluff, 155 Neb. 48, 52, 50 N.W.2d 533, 537 (1951). Since the plaintiff had the right to a full evidentiary hearing before the council, no prejudice resulted from the failure to notify the plaintiff of the first hearing before the director. The plaintiff was not prevented from presenting anything to the council that could have been presented earlier to

the director.

By statute, cities are empowered to define, regulate, and suppress nuisances and remove unsafe buildings which are a public nuisance.

Neb. Rev. Stat. § 18-1720 (Reissue 1983) provides:

> All cities and villages in this state are hereby granted power and authority by ordinance to define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same. Every city and village is authorized to exercise such power and authority within its zoning jurisdiction.

Neb. Rev. Stat. § 18-1722 (Reissue 1983) provides:

> In case any owner of any building or structure shall fail, neglect or refuse to comply with notice by or on behalf of any city or village to repair, rehabilitate, or demolish and remove a building or structure which is an unsafe building or structure and a public nuisance, the city or village may proceed with the work specified in the notice to the property owner. A statement of the cost of such work shall be transmitted to the governing body, which is authorized to levy the cost as a special assessment against the land. Such special assessment shall be a lien on the real estate and shall be collected in the manner provided for special assessments.

Cities of the metropolitan class are granted additional powers. Neb. Rev. Stat. § 14-102 (Reissue 1983) provides:

> In addition to the powers granted in section 14-101, metropolitan cities, as therein defined, shall have power by ordinance:
>
> . . . .
>
> (32) To prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits; to provide for the removal of any buildings, or structures or additions thereto erected contrary to such regulations, to provide for the removal of dangerous buildings, and to provide that wooden buildings shall not be erected or placed or repaired in the fire limits; but such ordinance shall not be suspended or modified by resolution nor shall exceptions be made by ordinance or

> resolution in favor of any person, firm, or corporation, or concerning any particular lot or building; to direct that all and any building within such fire limits, when the same shall have been damaged by fire, decay, or otherwise, to the extent of fifty per cent of the value of a similar new building above the foundation, shall be torn down or removed; and to prescribe the manner of ascertaining such damages and to assess the cost of removal of any building erected or existing contrary to such regulations or provisions, against the lot or real estate upon which such building or structure is located or shall be erected, or to collect such costs from the owner of any such building or structure and enforce such collection by civil action in any court of competent jurisdiction . . . .

Neb. Rev. Stat. § 14-419 (Reissue 1983) provides:

> The city council, in cities of the metropolitan class, shall have the power by ordinance to regulate, in areas within three miles of the corporate limits, except as to construction on farms for farm purposes . . . (2) the removal and tearing down of buildings, dwellings, and other structures in such areas which constitute nuisances because of the dilapidated, unsafe, or rundown condition or conditions . . . .

The city has enacted ordinances which implement the authority granted by statute.

Omaha Mun. Code, ch. 43, art. II, § 43-114 (1982) provides:

> Any building or structure found to be unsafe or unfit for occupancy or use, or any building or structure which is liable to fall or collapse from inherent structural weakness, or as the result of fire, decay or otherwise, and which the owner refuses to repair in accordance with the provisions of this division and the city's building code, or any structure located within the fire limits which has deteriorated from any cause to the extent of fifty (50) percent of the cost of a similar new building above the foundations, is hereby declared to be a nuisance. (Code 1959, § 37.08.040; Ord. No. 28752, 6-12-79)

Omaha Mun. Code, ch. 43, art. II, § 43-141 (1982) provides:

> Any and all buildings or structures which have any or

all of the following defects are hereby declared to be dangerous buildings:

. . . .

(i) All buildings and structures which because of their condition are unsafe, unsanitary or dangerous to the health, safety or general welfare of the people of the city.

Omaha Mun. Code, ch. 43, art. II, § 43-143 (1982) provides:

All dangerous buildings within the terms of this division are hereby declared to be nuisances and shall be repaired, vacated, or demolished as herein provided. (Code 1959, § 37.08.080; Ord. No. 28752, 6-12-79)

The evidence which has been previously summarized was sufficient to support the finding of the city council that the building in question was a nuisance and subject to condemnation and that the city did not exceed the authority vested in it by the Legislature.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION U-2. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE, V. JOHN D. AND PATTY R. ABRAHAMSON ET AL., APPELLANTS, EVERT ANDERSON ET AL., APPELLEES.

413 N.W.2d 290

Filed October 2, 1987. No. 86-119.

1. **Waters: Appeal and Error.** The proper standard of review for this court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., to determine if the judgment conforms to law, if it is supported by competent and relevant evidence, and if the DWR action is neither arbitrary, capricious, nor unreasonable.
2. **Constitutional Law: Statutes: Presumptions: Appeal and Error.** State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.

3. **Waters.** Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1984), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
4. **Constitutional Law: Legislature.** Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
5. **Statutes: Legislature: Intent: Appeal and Error.** In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
6. **Statutes: Legislature: Intent.** When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Steven G. Seglin and Leroy W. Orton of Crosby, Guenzel, Davis, Kessner & Kuester, and Bruce A. Peterson of Anderson, Strasburger, Klein, Peterson and Swan, for appellee Central Nebraska Public Power and Irrigation District.

Larry L. Ruth and Rodney M. Confer of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee State of Nebraska.

Gene D. Watson and John C. McClure, for amicus curiae Nebraska Public Power District.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

On November 2, 1984, the Central Nebraska Public Power and Irrigation District (hereinafter Tri-County) filed an application (Application U-2) with the Department of Water Resources (DWR), seeking recognition of incidental water storage in the three-county area of Gosper, Phelps, and Kearney Counties. The application alleged that a large mound of underground water had formed in this area as a result of seepage from Tri-County's 600-mile surface canal irrigation system. At that time Neb. Rev. Stat. § 46-226.01 (Reissue 1984)

provided as follows:

> Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation, and for recovery of such water, on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

That section was amended by 1985 Neb. Laws, L.B. 488, effective April 27, 1985, and codified as § 46-226.01 (Cum. Supp. 1986), by deleting the words "and for recovery of such water." The remainder of the statute was not changed, nor were there any additions. The hearing on Application U-2 began on July 31, 1985.

In conformity with the requirements of § 46-226.01, Tri-County set out in Application U-2 that the application was "for a permit to modify application or appropriation Nos. 2355; 2374; 3476; 3620; 3823; 4656; 5278; 7716; 9673; 10280; 10281 and 10282." The first of these applications had been filed on January 13, 1934, giving that application a priority date as of the filing, and the last three were filed with a priority date of January 20, 1964. All the applications which were to be amended by Application U-2 were for irrigation except No. 2374, which sought storage of water at Lake McConaughy in Keith County, Nebraska.

Application U-2 also sought service of additional lands not previously identified as being served by facilities included under any of Tri-County's 12 original appropriations. Application U-2 was objected to by numerous owners of lands overlying the water mound sought to be recognized as incidentally stored water. A hearing was held before the assistant director of DWR, who was the hearing officer for the proceedings. By a corrected order dated January 10, 1986, the director of DWR made findings and conclusions and approved Application U-2, in the following form:

> Application U-2 is APPROVED IN PART. Approval extends to all water appropriations listed above, except for

A-2374 which shall be limited to that portion of it identified in the records of the Department of Water Resources as A-2374R. Those water appropriations are hereby MODIFIED to include recognition of incidental ground water storage beneath the three-county area depicted on Map 6 [later corrected to Map 5] of Exhibit 3 (a metes and bounds description of the area perimeter is contained in Exhibit 12 and by reference is incorporated herein). Incidental ground water storage is from seepage and downward percolation of surface water diverted from the Platte River or from supplies previously impounded in Lake McConaughy and other Tri-County reservoirs. Other conditions made upon approval of Application U-2 are:

(1) This approval shall not alter the grant allowed each water appropriation nor shall the rate, quantity or time of surface water diversion for each be increased from that existing on the filing date of Application U-2. Neither shall this approval authorize structural modification of the facilities used to impound in surface reservoirs or to divert, carry or deliver water. The diversion rate for natural flow from the Platte River under water appropriations A-2355, A-10280 and A-10281 shall be governed by the provisions of §§ 46-231 and 46-240.01 which specify water duty limitations.

(2) The priority date for each water appropriation listed above shall not be changed.

(3) Water incidentally stored underground shall be withdrawn or otherwise be used for a beneficial purpose.

(4) Imposition of certain fees for mechanical extraction of ground water shall not be undertaken without prior approval from the Director as prescribed in § 46-2,100.

The order also stated that sufficient evidence was found to support the belief that Tri-County's irrigation project had resulted in the formation of the underground water mound sought to be recognized as incidental water storage, that DWR had consulted with the Nebraska Game and Parks Commission as required by Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1984), and that the project did not jeopardize endangered or

threatened species. The order further stated that the approval of Application U-2 would improve Nebraska's standing in the event of interstate disputes involving the Platte River and its tributaries and that the public interest would be served if the application was approved. The order specifically left the determination of the constitutionality of § 46-226.01 to this court. The objectors to the application timely appeal to this court.

The seven errors assigned by appellants may be consolidated into four: (1) whether DWR erred in approving Application U-2 without having first found that the water stored or to be stored will be used for irrigation purposes; (2) whether § 46-226.01 is unconstitutional, in that it permits the taking of storage under the overlying property owners' land without just compensation and is an unconstitutional delegation of legislative authority, and whether DWR's regulations are sufficient to properly advise the public of what information is required by DWR before an application for incidental storage will be granted; (3) whether DWR erred in recognizing the incidental water storage occurring before the effective date of § 46-226.01; and (4) whether DWR erred by not applying the interbasin transfer statutes, Neb. Rev. Stat. §§ 46-288 and 46-289 (Reissue 1984), in its consideration of Application U-2. For the reasons hereafter stated, the decision of DWR approving Application U-2 is affirmed.

The facts concerning Application U-2 are largely undisputed. The record shows that Tri-County holds 12 separate permits for irrigation and water storage. Its facilities are located in Keith, Lincoln, Dawson, Gosper, Phelps, and Kearney Counties in Nebraska, and include facilities of the district such as Lake McConaughy, Kingsley Dam, Kingsley Power Plant, Diversion Dam, Supply Canal, Jeffrey Reservoir and Power Plant, Johnson Reservoir, Johnson No. 1 Power Plant, Johnson No. 2 Power Plant, Canaday Steam Plant, and irrigated areas served from the Supply Canal, Lateral 365, Carl T. Curtis Dam and Pump Station, Elwood Reservoir, Lateral E67, and the Phelps County Canal. Its irrigation system consists largely of three separate feeder canals. Tri-County's earlier permits, set out above, authorize the service of irrigation

to approximately 138,000 acres of land in the area of Gosper, Phelps, and Kearney Counties. The overall length of the laterals and feeder canals constituting the basis for the irrigation service to those acres totals approximately 600 miles.

Hydrologists, qualified as expert witnesses testifying for Tri-County, established the level of the ground water underlying the three-county area in the predevelopment period (using data from between 1931 and 1952) before Tri-County began its irrigation services in 1941. The level of the ground water in 1983 was also established. The difference between the two levels was determined to be water incidentally stored underground as a result of Tri-County's irrigation operation and the seepage therefrom. The perimeters of the underground storage area were also established by expert witnesses, using data from wells drilled in the area between 1941 and 1983. The quantity of such incidentally stored water was determined to be between 6.5 million and 7 million acre-feet of water, in natural underground storage, beneath approximately 684,000 acres of land located in the three-county area.

This amount of land includes the 138,000 acres already identified as being irrigated in Tri-County's 12 existing water appropriations. In addition to this land, the water mound lies beneath approximately 546,000 acres of land which were not being served by any of Tri-County's existing appropriations. In this area, 257,300 acres are currently being irrigated by well, and 288,700 acres are not being irrigated in any manner.

The proper standard of review for this court to follow in cases involving appeals from DWR under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., to determine if the judgment conforms to law, if it is supported by competent and relevant evidence, and if the DWR action is neither arbitrary, capricious, nor unreasonable. *In re Application A-15738, ante* p. 146, 410 N.W.2d 101 (1987).

The appellants' first assignment of error contends that

> [t]he Director erred by approving the service of additional amounts of land or different lands not identified to be served under the 12 original applications without first finding that the water stored or to be stored underground

> will be used for irrigation purposes, and that action was arbitrary and capricious.

The appellants rely on a strict construction of Neb. Rev. Stat. § 46-226.02(1)(b) (Cum. Supp. 1986), which provides that the director of DWR may approve the service of additional amounts of land not already identified as being served by an existing appropriation "[i]f the water stored or to be stored underground will be used for irrigation purposes." Appellants' position reads into the statute a condition that it must be shown the water will be used for irrigation of each acre of land overlying the storage area before the application can be approved.

Appellants' position seems to imply that in order to comply with § 46-226.02(1)(b), the water incidentally stored must be used immediately for irrigation on the land under which it is stored. Such a concept is at odds with the basic meaning of "storage," which has been defined to mean "a space for storing." To store something is "to stock or furnish against a future time" or "to collect as a reserved supply." Webster's Third New International Dictionary, Unabridged 2252 (1981). We hold that in § 46-226.02(1)(b), the phrase "will be used for irrigation purposes" is to be construed as water being available for irrigation uses after the storage.

In connection with this contention, the director's corrected order stated:

> (13) In disputing the meaning of "service," the parties centered their attention upon the intent of § 46-226.02 (1)(b). Objectors advocate a narrow definition. They contend that service is accomplished when water is provided directly to irrigated fields. Tri-County argues for a less restraining interpretation. It contends that service has already been rendered. Recharge of the ground water reservoir underlying both projects lands and others constitutes the service.
>
> In turning to the language adopted by the legislative body and to legislative history for guidance, Tri-County's assertions are deemed better. As a precondition to approving Application U-2 (or other applications like it), the Legislature did not indicate or even imply that an

applicant must first provide wells, pumps, pipelines, energy needs and any other ingredients necessary to extract recharged ground water. Therefore, recharge of the ground water reservoir which supports present, and will support additional future uses, constitutes Tri-County's service.

Lands, including those authorized by the water appropriations listed above, which overlie the ground water reservoir recharged by the Tri-County project, are depicted on Map [4] of Exhibit 3. They are "squared off" for administrative convenience on Map [5] of Exhibit 3. A substantial portion of the total is now irrigated with ground water. Nothing in the record suggests that significant future uses will be for anything other than irrigation.

Thus, all the lands depicted are properly within the scope of Application U-2. They should be incorporated in the ultimate ruling made herein.

We agree with the director as to the meaning of "service" in § 46-226.02(1)(b), as used in this case. The service to be rendered in Application U-2, in this case, consists of the storage of water underground "for irrigation purposes."

Underlying the problem facing the director of DWR in determining this issue is the fact that this underground water storage is not held in neatly confined reservoirs or bins, but is available as nature presents the situation to humans trying to avail themselves of something furnished by nature—the underground strata making water storage possible. It is completely unrealistic to pretend the water which accumulates under Tri-County's laterals and canals will remain in storage precisely under the lands which Tri-County has been authorized to service with irrigation waters. The water, of necessity, will move into the entire natural storage field, following the laws of nature. The outline of that storage field was testified to and established by expert testimony, and not seriously questioned by appellants. Realizing that, the fact that some of the storage field lies beneath land not irrigated should not require that the entire project be lost on that account alone.

Section 46-226.02(1)(d) is also applicable to Application U-2,

and must be considered. This section of the statute allows the director to approve an application when the application is for incidental underground water storage and the stored water apparently is being withdrawn or is otherwise being used for beneficial purposes. One of the purposes of Application U-2 has been stated as to seek recognition of incidental underground water storage as a beneficial use. The director of DWR found that "[i]n providing water for direct irrigation and for recharge, the Tri-County project is an economic and social benefit to the community. Public interest has been and is being well served." The incidentally stored water is being withdrawn for irrigation purposes for the 257,300 acres of overlying land which is irrigated. As to the acres of unirrigated land, the water there is available to be withdrawn for beneficial uses such as domestic, municipal, or irrigation, under the authorization of DWR. We agree with the determination of the director that the project authorized in the order granting Application U-2 is an economic benefit to the region. We hold that the director did not err, in the manner alleged in appellants' first assignment of error, in granting approval to Application U-2.

Appellants' second assignment of error contends that § 46-226.01 is unconstitutional in that permitting a taking of the storage under overlying property owners' land without just compensation is an unconstitutional delegation of legislative authority, and in that the director has not provided sufficient regulations for an application. We have held that state laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution. *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986); *State v. Mayhew Products Corp.*, 211 Neb. 300, 318 N.W.2d 280 (1982). Furthermore, unconstitutionality must be clearly established before this court will declare a statute void. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Appellants first contend § 46-226.01 is unconstitutional because it allows for the taking of storage space beneath overlying property owners' land without just compensation, citing Neb. Const. art. I, § 21, which provides, "The property of no person shall be taken or damaged for public use without

just compensation therefor." Appellants urge that landowners have a constitutionally protected property right in the storage space beneath their property, derived from their right to use the water.

In this connection, the manner in which water is treated in the Nebraska Constitution and the statutes enacted thereunder becomes of critical importance. Neb. Const. art. XV, § 4, provides: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

In *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966), we specifically recognized the relation of this section to underground water. At 799-800, 140 N.W.2d at 636-37, we stated:

> The Constitution of Nebraska provides that the necessity of water for domestic use and for irrigation purposes in the State of Nebraska is a natural want. Art. XV, § 4, Constitution. While this section of the Constitution has been related primarily to the diversion of water from rivers and streams, its relation to underground water is no different. Historically the state adopted the riparian right theory of the common law of England and subsequently impressed upon it the doctrine of appropriation. The rights of appropriators under the latter doctrine have been spelled out by statute and judicial interpretation while the rights of riparian landowners remain unsettled and undefined.
>
> Underground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. Such waters are as much a part of the hydrologic cycle as the flow of water in a stream or river. It is true that such waters are not concentrated as in a river nor do they move with the velocity of a river, but they do percolate through underground formations and have the same source and termination as surface water flowing in a river. Underground waters are a part of the source of water supply to a growing population and an expanding economy the same as the surface waters flowing in a live

> stream on the surface of the ground. Because of the ever-increasing demands for water control of underground waters as well as the flow of rivers and streams, it is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained. Without any declaration of public policy as to the use of underground waters other than the constitutional declaration that they are a natural want, we adhere to the rule that such waters must be reasonably used for a beneficial purpose without waste. It is axiomatic that waters which flow beyond the points of use to the sea are lost and constitute a form of waste, which is against public policy.

Statutes have been enacted concerning many phases of the problems arising from water, its scarcity or overabundance at times, the need of the state for water, and the public interest considerations that must govern the use of water.

The Nebraska Legislature has enacted the Nebraska Ground Water Management and Protection Act, Neb. Rev. Stat. §§ 46-656 to 46-674 (Reissue 1984). This act was first adopted in 1975, and at the time of the application and hearing in this case had last been amended as of July 10, 1984, and February 15, 1985. Section 46-657(2) states: "Ground water shall mean that water which occurs, moves, seeps, filters, or percolates through ground under the surface of the land."

That definition of ground water was further clarified in Neb. Rev. Stat. § 46-296(4) (Cum. Supp. 1986), which states: "Underground water storage shall mean the act of storing or recharging water in underground strata. Such water shall be known as water stored underground, but the term shall not include ground water, as defined in section 46-657, which occurs naturally."

This court has held that an overlying property owner has a protected right in the use of ground water, as defined in § 46-657, arising from his ownership of the surface above the ground water. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985). In *Sorensen*, we held the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by the

Constitution. That right to use water beneath one's land, however, is clearly not unfettered. Nebraska has developed a rule for ground water based on reasonable use and correlative rights. In *Sorensen* at 188, 376 N.W.2d at 546, we quoted from *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), as follows:

> "[T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . ."

In their brief at 17, appellants state, "The right to use groundwater establishes the right to use underground storage for groundwater." The protected right of landowners is the right to the use of the ground water, and does not reach the ownership of the water itself. Nebraska's ground water is itself publicly owned. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). Ground water is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. The right is recognized by statute. Section 46-656 provided in part, at the time of the hearing in this case, "Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the ground water supply is insufficient for all users." Appellants urge that the right to use the ground water gives rise to the exclusive right to use the storage space, that the storage space is theirs, and that "the recognition of incidental underground storage" constitutes an unconstitutional taking of their property. We disagree. We are here concerned with two general classifications of water existing beneath the ground: (1) ground water, as defined in § 46-657, which occurs naturally, and (2) water which has accumulated incidentally underground as a result of seepage from manmade facilities.

Section 46-226.01 provides:

> Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

That legislative enactment does not purport to have the director of DWR authorize any taking of an interest in land, but only sets out a procedure for recognizing an appropriator's interest in water incidentally stored underground, if authorized.

There was no evidence before the director as to any harm resulting to appellants' lands from that recognition. Appellants have not shown that § 46-226.01 amounts to an unconstitutional taking without just compensation. A statute cannot deprive a person of property unless it prevents him from doing an act which he desires to do or diminishes the enjoyment or profit which he would otherwise derive from his property. 16A C.J.S. *Constitutional Law* § 506 (1984). Appellants in this case have presented no evidence which indicates that § 46-226.01 interferes with the use of their property. Absent such a showing, appellants have no standing to assert the unconstitutionality of the statute as taking their property. *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973); *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1900).

Appellants' rights in the use of the "ground water" (within the meaning of § 46-657) under their lands are not affected. The calculation of the amount of that water is now more difficult, but clearly can be made. Indeed, as set out above, the calculation of the amount of water incidentally stored in this case was based on establishing the level of § 46-657 ground water before incidental storage began after the construction of appellee's facilities, which eventually resulted in the § 46-226.01 "underground water storage."

Section 46-226.01 is concerned with water for use and is constitutional in that it recognizes incidental underground water storage associated with a proper appropriation and, as

such, complies fully with the intent of Neb. Const. art. XV, § 4, and does not conflict with other sections of the Nebraska Constitution.

Appellants further argue that § 46-226.01 is an unconstitutional delegation of legislative authority and that it does not contain adequate legal standards to govern the director's review of an application. We find no merit in this claim. We have held that where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists. *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 186 N.W.2d 729 (1971). Section § 46-226.02 sets out specific conditions which must be met before the director may approve an application, where it provides, in part:

> (a) The rate, quantity, or time of surface water diversion shall not be increased from that approved for the original appropriation;
>
> (b) If the water stored or to be stored underground will be used for irrigation purposes, the director may approve the service of additional amounts of land or different lands not identified to be served with facilities included under the original appropriation, if the director determines that the change is in the public interest, and that any interference with the rights of senior appropriators as a result of such change is unavoidable and not material;
>
> (c) The priority date shall remain the same as that of the original appropriation; and
>
> (d) When the application is for recognition of incidental underground water storage, such stored water is being withdrawn or is otherwise being used for beneficial purposes.
>
> (2) For an application filed pursuant to section 46-226.01, the burden shall be on the applicant to prove that underground water storage has occurred.
>
> (3) The director may grant the application in a modified or reduced form, if required by the public interest, and may impose such other reasonable conditions as deemed

appropriate to protect the public interest.

(4) The director's order of approval shall specify:

(a) The source of the water stored or to be stored underground;

(b) The underground water storage method; and

(c) A description of the area served or to be served by the water stored underground.

In addition, Neb. Rev. Stat. § 46-209 (Reissue 1984) gives DWR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes . . . ." The Legislature has recognized the expertise and experience needed to determine the difficult questions presented in the overall water situation in this state when it required, by Neb. Rev. Stat. § 46-701 (Reissue 1984), that the director of DWR be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work.

This court has recognized the difficulties inherent in requiring the Legislature to spell out each standard in complex fields in areas where expanding technology and complex theories daily change. In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979), we stated:

> The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.

Similarly, in *Anderson v. Tiemann*, 182 Neb. 393, 401-02, 155 N.W.2d 322, 328 (1967), we stated: "Delegation of

legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision."

Section 46-226.01 does provide that after receiving an application, DWR "shall proceed in accordance with rules and regulations adopted and promulgated" by DWR. The fact that all the standards are not specifically listed in § 46-226.01 does not require a finding of unconstitutional delegation of authority. Standards which guide an administrative agency need not all be embodied in one statute, but may be found in others. The conditions found in § 46-226.02, when taken with the broad statutory authority granted to the DWR over the use and appropriation of water within the state (see § 46-209), provide for adequate standards governing the director's review of applications such as Application U-2. We have earlier discussed the burden on appellants to show a statute is unconstitutional, before this court will rule it invalid. In this argument, as before, appellants have failed to overcome the presumption of constitutionality afforded the legislative enactments. Section 46-226.01 is constitutional.

Insofar as appellants contend the director's regulations do not "contain adequate standards," we also determine that that contention is without merit. DWR regulations with regard to this application provided only, in addition to notice to be published, that "[e]ach application shall be accompanied by sufficient hydrologic information to identify the extent and scope of the underground storage and recovery." Neb. Admin. Code tit. 457, ch. 16, art. 001 (1984).

In this day of extraordinarily verbose administrative regulations, we determine it is not appropriate to condemn an administrative director in this case for saying too little. We determine that the DWR regulations are adequate to inform an applicant and possible objectors of the issues before the director. In addition to the statutory standards set out above, an applicant must supply "sufficient hydrologic information" before the application may be approved. Applicant's evidence must reach that standard. In this case, much evidence was presented on that issue. The objectors knew from reading the regulation above that they could defeat the application by

showing that the applicant did not supply sufficient information to permit the director to approve the application. Objectors presented their position by skilled, close cross-examination of applicant's experts and by presenting an expert witness of their own. The DWR regulations, when coupled with the statutory enactments, clearly outlined the legal field of battle and were not unconstitutional.

Appellants' third assignment of error contends that the director erred in recognizing incidental underground water storage occurring prior to the effective date of § 46-226.01. Appellants urge that the statute should be applied prospectively, and not retroactively. A retroactive application, appellants argue, would result in appellants' loss of the right to use the underground storage space beneath their land. The problem here is that the overlying property owners' protected rights are in the use of the water, not in the storage space. Their right to use the water is not being disturbed by the approval of Application U-2.

Appellants rely on *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960), to support their proposition that a legislative act will operate only prospectively, and not retroactively, unless the legislative intent and purpose that the statute operate retroactively is clearly disclosed. Appellants suggest a reading of § 46-226.01 does not disclose any reference to a retroactive application allowing for recognition of incidental underground storage occurring prior to August 26, 1983, the effective date of the statute. We disagree with appellants' position. We have held that in considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense. *Clinchard v. White*, 223 Neb. 139, 388 N.W.2d 477 (1986). While § 46-226.01 does not in and of itself indicate the legislative intention that it be applied retroactively, other sections of the act must be considered. Section 46-226.02 aids in determining the intent of the Legislature. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different

provisions of the act are consistent and sensible. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987). Subsections 46-226.02(1)(b) and (4)(a) refer to the recognition of water "stored or to be stored." The plain meaning of that section shows the intent of the Legislature to allow an approval for an application seeking recognition of water stored prior to the effective date of § 46-226.01. Indeed, § 46-226.01 provides that only persons having appropriations can request that incidental storage rights be recognized. Of necessity, the statute contemplates recognizing already existing storage. In addition, Neb. Rev. Stat. § 46-295 (Cum. Supp. 1986) refers to water that "has been, is, and will be" incidentally stored in the underground strata. We hold, then, that when read collectively, it is clear that the intent of the Legislature was to apply the statutes concerning recognition of incidental underground water storage retroactively to include the recognition of incidentally stored water occurring prior to the effective date of those statutes.

Appellants' final assignment of error contends that the director erred in his consideration of Application U-2 by not applying the interbasin transfer statutes, §§ 46-288 and 46-289. Those statutes require that the director of DWR consider certain factors before granting or denying an interbasin transfer of water. Appellants argue that since water is flowing underground from the Platte River basin into the Republican and Little Blue River basins, the director should have applied the interbasin transfer statutes. Section 46-288(3) defines an interbasin transfer as "diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use." Appellants contend that whenever there is a transportation of water for a beneficial use to another basin, an application for approval of interbasin transfer is required. We agree with appellants' reading of §§ 46-288 and 46-289, in that an application for approval is required before an interbasin transfer takes place. We do not agree with appellants' contention, however, that approval was required in the case at bar. We have previously discussed the basic rule of statutory construction, in that the language of a statute will be given its plain or ordinary meaning. When the

words of the statute are unambiguous, no additional interpretation is necessary. *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). Sections 46-288 and 46-289 are concerned with interbasin transfers. This term is clearly defined in § 46-288(3) as "the diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use." While Application U-2 appears to include an interbasin transfer, in that water is flowing from the Platte River basin into the Republican and Little Blue River basins, we agree with the director in his finding that movement of water through subsurface strata as has occurred in this case, resulting in the formulation of the underground mound, was not the sort of interbasin transfer defined in § 46-288. That section includes the terms "diversion" and "transportation." The plain meaning of § 46-288 is that the director must consider interbasin transfers of water if an affirmative act to transport from one basin to another has been shown. The interbasin transfer occurring in the case at bar is done naturally and will occur whether or not an application under the interbasin transfer statutes is approved. Tri-County has not diverted or transported water as defined in § 46-288(3). No purposeful act is the cause of the flow of water from one basin to another. We hold, then, that the director did not err in not applying the interbasin transfer statutes before giving his approval to Application U-2.

We determine that the director has not erred as alleged by appellants. The order of the director of DWR approving Application U-2 is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. GARY A. BOCIAN, APPELLANT.

413 N.W.2d 893

Filed October 9, 1987. No. 86-793.

1. **Constitutional Law: Entrapment.** The entrapment defense is not mandated by either the state or federal Constitution.
2. **Jury Instructions: Entrapment: Proof.** NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
3. **Criminal Law: Sentences.** The punishment for a criminal act should in all circumstances be commensurate with the offense.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

James Martin Davis, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The appellant, Gary A. Bocian, was found guilty by the verdict of a jury of each count of a five-count information. A sixth count was dismissed by the trial court. The charges arose out of two separate purchases of LSD and marijuana on January 31, 1986, and a later seizure after search of a quantity of LSD and marijuana. Both of the controlled substances were sold at each sale. Bocian was sentenced to a term of from 4 to 8 years on each count, to be served concurrently. He appeals.

Three errors are assigned: (1) The trial court erred in giving verbatim NJI 14.34 (entrapment) and thus failing to instruct on its own motion that it was the burden of the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the offenses charged; (2) the trial court erred in submitting to the jury multiple counts of the same offense which were all based on the same act or transaction; and (3) the trial court erred in imposing excessive sentences.

The evidence discloses that a state patrolman, along with one Jack Cary, a cooperating individual (Cary had been previously

arrested for the unlawful sale of methamphetamine), purchased one-half ounce of LSD and two baggies of marijuana from Bocian on January 31, 1986, at approximately 11:30 a.m., and at 8 p.m. purchased another one-half ounce of LSD and two baggies of marijuana. After the second sale Bocian was arrested. A search warrant was secured, and, as a result of the search, two additional plastic bags of LSD and three bags of marijuana were found on his person and a quantity of LSD was found at his residence. Bocian admitted the sales, but contended at trial that he was improperly induced to commit the offenses.

We will deal with the assigned errors in the order argued by the appellant.

The instruction given by the trial court was a verbatim recitation of the pertinent parts of NJI 14.34, and reads as follows:

> The defendant contends that he was improperly induced to commit the unlawful conduct with which he is charged.
>
> If a law enforcement officer induced the defendant to commit an unlawful act, and the defendant would not have committed the act but for the inducement, then the defendant is not criminally responsible for that act.
>
> On the other hand, if a law enforcement officer did not induce the defendant's conduct, because the defendant was predisposed or ready to commit the act and was merely afforded an opportunity by the law enforcement officer to do so, then the defendant may be found guilty, provided that the State has proved all the essential elements of the crime beyond a reasonable doubt.
>
> Inducement may take different forms, such as persuasion, fraudulent representations, threats, or other coercive tactics, or holding out the promise or hope of reward. However, law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or

ready to commit it.

The State must prove beyond a reasonable doubt that the defendant was not improperly induced to commit any unlawful conduct. If you have a reasonable doubt whether or not the defendant was improperly induced to commit the offense, you must find the defendant not guilty.

The appellant cites *United States v. Jannotti*, 729 F.2d 213 (1984). In that case undercover Federal Bureau of Investigation officers sought out various members of the city council of the city of Philadelphia, requested political assistance, and subsequently paid money to the council members. The defendants were tried and convicted of violations of the Hobbs Act, 18 U.S.C. § 1951(a) (1982) (conspiracy to interfere with interstate commerce) and of the RICO Act, 18 U.S.C. § 1962(d) (1982) (conspiracy to conduct an enterprise through racketeering activities). The court in its instructions on the issue of entrapment required of the defendants to first introduce evidence of inducement, and only then instructed the jury that "the government [had] the burden of proving predisposition beyond a reasonable doubt." 729 F.2d at 225. The first part of the instruction was disapproved, suggesting that the appropriate instruction was that the burden was on the government to prove (1) no improper inducement existed and (2) prior disposition to commit the offense.

We observe first that the entrapment defense "is not of a constitutional dimension." *United States v. Russell*, 411 U.S. 423, 433, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973). "This Court first recognized and applied the entrapment defense in *Sorrells v. United States*, 287 U.S. 435 (1932)." 411 U.S. at 428. The *Russell* majority observed at 428 n.5 that "[t]he first case to recognize and sustain a claim of entrapment by government officers was apparently *Woo Wai v. United States*, 223 F. 412 (CA9 1915)," while the first time, apparently, that this court recognized the defense was *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967). Quoting *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 2d 413 (1932), this court approved the following language of Chief Justice Hughes:

"The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to

> reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

181 Neb. at 355-56, 148 N.W.2d at 326-27.

The court has specifically approved the giving of NJI 14.34 in *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980), and in *State v. Gurule*, 194 Neb. 618, 621-22, 234 N.W.2d 603, 606-07 (1975), where we said:

> The Nebraska Jury Instruction is phrased in terms of "improper" inducement. The representations made by an undercover agent are almost always false in some particulars and, to some extent, may constitute an inducement to commit the crime. It is improper inducement that gives rise to the defense of entrapment. Overpersuasion, undue pressure, or coercion may constitute improper inducement and entrapment. State v. Ransburg, *supra*. The important consideration in determining whether entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime. United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366. Reluctance or unwillingness on the part of the defendant may indicate an absence of predisposition or readiness to commit the offense. These matters are all covered in the Nebraska Jury Instruction . . . .

Aside from the obvious conclusion that no constitutional provision, state or federal, mandates the requested instruction, the instruction in fact places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced. Bocian's contention is artificial, and the alleged error is not meritorious.

The second assignment of error relates to the five counts of

the information. Counts I and II charged Bocian with delivery of LSD on January 31, 1986. Counts III and IV charged delivery of marijuana on the same date, and, finally, count V charged possession of LSD with intent to deliver.

It is true the counts do not allege which of the two incidents of sale of LSD and marijuana to the patrolman and Cary is the subject of the charge, nor does the fifth count describe which of the three separate incidents of possession of LSD is relied on to support this count. No attack is made on the sufficiency of the information. It is evident that the essential elements of the separate offenses are charged. The record does not disclose any motions addressed to the trial judge requesting a more specific statement of the charges.

We were faced with this very situation in *State v. Abraham*, 189 Neb. 728, 730, 205 N.W.2d 342, 344 (1973), wherein we said:

> Since the information here, although phrased in general language, is sufficient to state an offense, the defendants' challenge really goes only to the requisite certainty and particularity of the information for the preparation of their defense. It is not such a challenge as can be brought by way of motion in arrest of judgment. Instead, a motion to quash is the proper method of attack. § 29-1808, R.R.S. 1943; Matters v. State, 120 Neb. 404, 232 N.W. 781. The defendants failed to avail themselves of this procedure and pleaded not guilty. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. § 29-1812, R.R.S. 1943; State v. Fiegl, 184 Neb. 704, 171 N.W.2d 643; Nelson v. State, 167 Neb. 575, 94 N.W.2d 1; Green v. State, 116 Neb. 635, 218 N.W. 432.

The record discloses that at each sale a separate price was specified and negotiated for each quantity of controlled substance. The argument suggests that the sales and possession were part of one transaction, i.e., the same continuing act, and thus the appellant is subject to multiple prosecutions for the same act, violating the double jeopardy provisions of the U.S. and State Constitutions. In the first place, it is well established that the same act may constitute more than one offense, and the

prosecution for the two separate crimes is not barred, e.g., robbery and use of a firearm to commit a felony; second, the delivery of LSD and the delivery of marijuana are not lesser-included offenses of one another for a very obvious reason: each controlled substance is prohibited.

It is true that count V is a lesser-included offense of counts I and II, and this fact would be fatal to count V except that count V is based on an entirely separate possession (as disclosed by the search warrant) from the previous sales. Separately structured sales of contraband can sustain separate prosecutions for the prohibited sale. *United States v. Weatherd*, 699 F.2d 959 (8th Cir. 1983) (controlled substances). See, also, *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974). The assigned error is meritless.

Finally, Bocian argues that the sentences imposed are disproportionate to the offenses, and thus violate Neb. Const. art. I, § 15. We said in *State v. Foutch*, 196 Neb. 644, 646, 244 N.W.2d 291, 292 (1976), that "[t]he punishment for a criminal act should in all circumstances be commensurate with the offense."

Bocian stands convicted of five Class III felonies. The penalty range for a felony of that class is imprisonment from 1 to 20 years and/or a fine of not more than $25,000. We have no hesitancy concluding that the penalty of five 4- to 8-year concurrent sentences is not disproportionate to the delivery, or possession with intent to sell, of controlled substances. The judgment and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER H. JOHNSON, APPELLANT.

413 N.W.2d 897

Filed October 9, 1987. No. 86-997.

1. **Rules of Evidence: Witnesses: Prior Convictions.** In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by

establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.

2. **Motions for Mistrial.** In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded for a new trial.

Thomas L. Spinar, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a trial by jury, the defendant was convicted of the felony offense of issuing an insufficient-fund check. He appeals to this court, claiming as error the failure of the trial court to declare a mistrial based on misconduct of the prosecuting attorney. We reverse and remand for a new trial.

The defendant, on January 18, 1986, issued a check for $15,534 to Jack Keef Motors to pay for a motor vehicle which he had purchased. The defendant had insufficient funds in his checking account to pay the check. He failed to make good on the check after being contacted by both the auto dealership and the county attorney.

Defendant's defense was that he issued a check which he claimed the dealership had agreed to accept and hold. Following his failure to pay the check, the dealership repossessed the vehicle and held it for a period of 30 days before otherwise disposing of it.

The dealership denied that it had been asked by the defendant to hold the check for a definite period of time. Thus, the critical issue for the jury to determine was the credibility of the defendant.

The defendant's claim of error relates to certain questions propounded to the defendant by the prosecutor. First of all, the

prosecutor asked these questions:

Q. Have you ever sold securities?

A. No.

Q. Ever sold unregistered securities?

MR. SPINAR: Objection. This is irrelevant.

THE COURT: I am not sure about the relevance. I'd have to be advised on the matter. Approach the bench.

MR. CONNER [Prosecutor]: Well, I will withdraw the question.

Q. (By Mr. Conner) Where were you employed during the year of 1985?

MR. SPINAR: Objection. I don't see that that is relevant.

THE COURT: He may answer.

THE WITNESS: The year of 1985, I wasn't employed.

Q. (By Mr. Conner) You weren't employed?

A. No.

Q. Why?

MR. SPINAR: Objection, Your Honor. I don't think this is relevant.

Objection. Beyond the scope of direct examination.

THE COURT: Approach the bench.

. . . .

Q. (By Mr. Conner) Were you in prison in the months of January to June of 1985[?]

MR. SPINAR: Objection, Your Honor.

THE COURT: Sustained.

MR. SPINAR: Your Honor, I move for a mistrial on the grounds that counsel has deliberately sought to inflame the jury. It is prejudicial testimony.

. . . .

(Discussion off-the-record.)

In a later discussion in the absence of the jury, the motion for mistrial was overruled, but the court stated that the question relating to defendant's having been in prison was an improper question. However, because, as the court reasoned, the county attorney could have asked the defendant if he had been convicted of a felony, and the court understood that such was the case, the court felt there was no prejudice. The court then

instructed the jury that such a question was improper and should be disregarded, which instruction was agreed to by the defendant's counsel.

It is quite apparent from the line of questioning employed by the prosecuting attorney that he was trying to get across to the jury that the defendant had been imprisoned for selling unregistered securities, which might be a similar type offense to writing an insufficient-fund check. However, his method utilized was wholly improper and is to be condemned.

The Nebraska Evidence Rules are quite specific. Neb. Rev. Stat. § 27-609 (Reissue 1985) permits the offer of evidence of a witness' having committed a crime punishable by death or imprisonment of more than 1 year, or a crime which involved dishonesty or false statement regardless of the punishment, provided that not more than 10 years have elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date. Once having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. *State v. Daugherty*, 215 Neb. 45, 337 N.W.2d 128 (1983).

In *State v. Archbold*, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984), this court stated as follows:

> In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, *to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury.*

(Emphasis supplied.) See, also, *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

As previously stated, the credibility of the defendant as a witness was the critical issue in this case. The so-called "poison" having been injected into the case by the prosecutor, either deliberately or because of a lack of knowledge of the rules of evidence, it is problematical whether the defendant could have

received a fair trial.

It must be impressed upon the State that this court will not continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action "harmless error."

The judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS A.
DANEHEY, RESPONDENT.
413 N.W.2d 635

Filed October 9, 1987. No. 87-827.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original disciplinary proceeding submitted to this court upon the respondent's voluntary surrender of his license to practice law. Respondent, Thomas A. Danehey, voluntarily surrenders his license and consents to the entry of a disciplinary order against him.

Upon a careful review of the record before us, and based on the respondent's voluntary surrender of his license, his waiver of disciplinary proceedings, and his consent to the entry of an order of disbarment against him, we order that the respondent, Thomas A. Danehey, be, and hereby is, disbarred effective immediately.

JUDGMENT OF DISBARMENT.

GLENNA JEAN RITCHIE, APPELLANT, V. RAND CECIL RITCHIE, APPELLEE.
413 N.W.2d 635

Filed October 16, 1987. No. 85-872.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed as modified.

Patrick A. Brock of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellant.

Thomas A. Wagoner, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Glenna Jean Ritchie appeals from the decree of the district court for Hall County, dissolving her marriage with Rand Cecil Ritchie, and claims that alimony decreed and attorney fees awarded are inadequate. We modify the award of alimony and affirm the decree as modified.

Glenna married Rand in 1971. While Rand was enrolled in a premedical program at the University of Nebraska-Lincoln, Glenna enrolled in a course of studies at that university. For approximately 1 year, while the Ritchies attended the university, their major source of income was student loans. After moving to Omaha so Rand could attend medical school, Glenna discontinued her studies to work full time to help support the couple. Although Glenna later resumed her studies, she never completed her college education, due partly to the Ritchies' frequent movements required by Rand's schooling and subsequent medical practice after graduation. While Rand was pursuing his degree, Glenna was the major source of support for the Ritchies, holding several different jobs, mostly at the minimum wage. Rand began his residency in psychiatry in 1976, which took the Ritchies to Portland, Oregon, back to Omaha, and then to Lincoln.

In 1979, Rand completed his residency requirements, and the Ritchies moved to Manhattan Beach, California, where Rand was employed by a medical group as a staff psychiatrist and

earned approximately $46,000 per year. Rand and Glenna moved to Grand Island, Nebraska, in 1980, to allow Rand to establish a private practice in psychiatry. Glenna worked in her husband's office as a receptionist and performed other office duties, but received no specific remuneration for such assistance to Rand in his practice. The Ritchies have no children. At time of trial, Glenna was 33 years of age; Rand was 34.

In 1984, Glenna filed her petition for dissolution of her marriage with Rand. The couple has lived without a budget, has dined out four times a week, and has taken trips to California and Colorado. In addition, Rand has taken several trips to Oregon, Hawaii, Colorado, and Kansas City. Their newly constructed home was completed in May of 1984. Since moving back to Nebraska, Rand has been the sole source of support for Glenna. After separation from Rand, Glenna depended upon temporary support payments from Rand, $60 per week which she earned as a part-time floral designer, and a small amount from other odd jobs, including interior decorating. Glenna expressed her desire to complete her college education for an art degree.

Glenna's monthly expenses are approximately $620. Although Glenna lives in the couple's new house, she does not make any house payments. Eventually, the house will be sold or deeded over to the bank which holds the mortgage on the premises. The outstanding debt on the house is $274,000, and the bank has offered to acquire the house and give Ritchies credit for $200,000, which, as far as the record reflects, may leave a substantial but unspecified deficiency.

Rand testified that he is again living in Manhattan Beach, California, where he is employed as a staff psychiatrist by the same medical group for which he had previously worked. Rand annually earns approximately $59,000 and has personal debts of about $50,000, including student loans, debts owed to members of his family, a loan for a new Jeep, and various credit card debts used for personal and moving expenses. Rand failed to pay temporary support payments to Glenna, and yet repaid part of a loan to his sister and gave a nurse $1,500 to embark on a humanitarian mission in connection with an earthquake in

Mexico.

In its dissolution decree, the district court quieted title to certain personal property in each party's name, including a 1982 Volvo awarded to Glenna and 1959 and 1984 Jeep automobiles awarded to Rand. Rand was ordered to pay the outstanding debts of the parties (which included the deficiency on the house) and to hold Glenna harmless concerning all debts of the parties. Further, Rand was ordered to pay Glenna alimony as follows:

> a. The sum of Six Hundred Dollars ($600.00) per month for a period of Twenty-four (24) months, commencing November 1, 1985, and ending October 1, 1987.
>
> b. The sum of Four Hundred Dollars ($400.00) a month for a period of Twenty-four (24) months, commencing November 1, 1987, and ending October 1, 1989.
>
> c. The sum of Two Hundred Dollars ($200.00) a month, commencing November 1, 1989, and ending October 1, 1990.

The decree also awarded Glenna $1,000 to apply to her attorney fees. Glenna appeals, claiming the alimony and attorney fees awarded are inadequate.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987). See, also, *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987) (alimony award); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986) (alimony award).

"An appropriate award of alimony must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984)." *Gale v. Gale, supra* at 805, 401 N.W.2d at 502. As reflected in

Neb. Rev. Stat. § 42-365 (Reissue 1984), factors affecting the amount of alimony include the duration of the marriage, history of contributions to the marriage by each party, interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment. In addition to the factors set out in § 42-365, the income and earning capacity of each party must also be considered. *Gale v. Gale, supra; Taylor v. Taylor, supra.* Section 42-365 also states in part: "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate."

With the foregoing in mind, we believe the trial court abused its discretion in the alimony awarded to Glenna. Our de novo review of the record reveals that the alimony awarded falls short of fulfilling the purpose and objectives of alimony as set forth in § 42-365. The parties were married 14 years. Glenna interrupted her education and career in order to help support Rand while he obtained his medical degree. Glenna later assisted Rand in establishing his practice in psychiatry and was substantially dependent upon him for support. As a consequence, Glenna's income, earning capacity, and job training are limited, and her employment record consists, for the most part, of jobs that paid minimum wages; for example, Glenna was earning approximately $60 per week at the time of trial from her part-time job as a floral designer. Glenna indicated, however, that she would like to return to school and earn her degree, thereby attempting to resume her career which had been interrupted by marriage. On the other hand, Rand is a psychiatrist with established employment from which he earns $59,000 per year. Although Rand has been ordered to pay the parties' outstanding debts, the record indicates that except for the deficiency expected upon disposition of their house, the debts incurred relate mostly to Rand's own personal expenses or to the advancement of his career.

From the entire record we conclude that the alimony awarded was inadequate and constitutes an abuse of discretion by the district court. Based on the record presented, the alimony award is inadequate to provide for Glenna's continued

maintenance and support, considering the respective economic circumstances of the parties and Glenna's desire to resume her education. Therefore, the district court's judgment and decree is modified, that is, Rand shall pay to Glenna the sum of $600 per month, as alimony, commencing November 1, 1985, with such monthly payments of alimony to continue until October 1, 1990.

Finally, appellant argues that the trial court erred in awarding her an insufficient amount for attorney fees. An award of attorney fees is a matter within the trial court's sound discretion, is reviewed de novo on the record, and will be affirmed on appeal in the absence of abuse of discretion. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Ritchey v. Ritchey*, 208 Neb. 100, 302 N.W.2d 372 (1981). The award may depend on a variety of factors, including the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Guggenmos v. Guggenmos, supra; Smith v. Smith, supra.* Considering the nature and circumstances of this case, the award of an attorney fee of $1,000 is not an abuse of discretion and is affirmed.

The decree of the district court is affirmed as modified.

Glenna is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

GRANT, J., not participating.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent on the issue of alimony. The record reflects respondent's earnings as a psychiatrist; however, his net income and available funds to pay the ordered alimony are speculative, since the amount and due date of some of the debts that he was ordered to pay are unknown, particularly the large prospective deficiency debt due the bank.

The ultimate test in allowing alimony is reasonableness as

determined by the facts in each case. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987). The fixing of alimony rests in the sound discretion of the trial court, and in the absence of an abuse of discretion, it will not be disturbed on appeal. *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985). An abuse of discretion requires that the reasons or rulings of the trial judge be clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice. *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

The problem here is not an abuse of discretion in the amount allowed for alimony; rather, it is the absence of clear evidence as to the amount and due dates of the debts necessary for the trial court's consideration to make a reasonable award. The same problem prevents this court from making a considered alimony award.

Considering the evidence or lack of evidence presented to the trial court, it cannot be said that the trial judge abused his discretion in the amount of the alimony award. I would affirm.

CAPORALE, J., joins in this dissent.

THIRD PARTY SOFTWARE, INC., APPELLEE AND CROSS-APPELLANT, V. TESAR MEATS, INC., APPELLANT AND CROSS-APPELLEE.

414 N.W.2d 244

Filed October 16, 1987. No. 85-979.

1. **Judgments: Appeal and Error.** The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
2. **Trial: Damages: Appeal and Error.** Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Dean J. Jungers of Hascall, Jungers & Garvey, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit for damages in a contract termination case involving computer services that plaintiff, Third Party Software, Inc. (Software), had agreed to supply to defendant, Tesar Meats, Inc. (Tesar). Tesar appeals the dismissal of its counterclaim, and the $5,195.20 judgment in favor of Software. Software cross-appeals, claiming inadequate damages. A jury was waived. We affirm.

Tesar assigns four errors. First, its motion for a directed verdict at the close of plaintiff's case was denied. Tesar failed to address this error in its brief, and we do not discuss it. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). Second, the trial court failed to consider that Software did not mitigate its damages. Third, the trial court erred in assessing the damages, and the damages were excessive. Fourth, it was error to dismiss Tesar's counterclaim.

The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982); *Stauffer v. Wilson*, 182 Neb. 129, 153 N.W.2d 454 (1967).

There is little dispute in the evidence. The trial judge could find that Tesar is a processor of meats in Omaha, Nebraska, selling both retail and wholesale. Software was starting a new computer service business in Council Bluffs, Iowa, intending to provide accounting, business records, and other computer-related services to various customers, either by placing computers at the customer's business or by connecting the customer via telephone lines with a larger computer located in its Council Bluffs office. The latter arrangement was the subject of this lawsuit. Tesar was Software's first major service customer; the contract was described as a startup contract wherein Software did not contemplate making a profit; rather,

it expected to break even.

In 1982 and 1983, Tesar's operations showed dramatic unexplained losses which were suspected to be an inventory problem; particularly, the inability to trace raw products through the processing and delivery procedures. After some discussion between the parties, a written contract was executed by both parties on July 13, 1983, whereby Software was to design a special program for Tesar, including accounting, business records, inventory information, and other services to Tesar for a 3-year period at $505 per month rental. No beginning date was included in the contract; however, both parties assumed that it would be September 1, 1983. In fact, the monthly payments were to begin on September 1, 1983, unless Software could not perform due to equipment delays. Software began to acquire the necessary equipment. Credit arrangements were made to purchase a large-capacity model 9300 computer from NCR Corporation, which was ordered in August 1983 but not delivered to Software until late November 1983. This computer could support 14 terminals, of which 3 would be assigned to Tesar. About September 1, 1983, Software rented a small model 8271 NCR computer to serve the Tesar contract; however, Software did not then have the other needed complementary parts to install the computer equipment at Tesar. All of the parts were received on October 4, 1983, and they were taken directly to Tesar for installation, where John Tesar, president of the company, was found in an agitated state because he had just been told by his bank creditor that the Tesar note was being called because of its last unsatisfactory auditor's report. John Tesar said, "We're going out of business," "It's all over," "There's nothing we can do." Software ceased installation and removed most of its equipment that had been brought. Software hoped that Tesar could solve its credit problems and resume the contract; however, Software removed all of its equipment by January 1984, and this suit followed, wherein Software claimed $18,180 damages for all of the unpaid monthly installments. Tesar filed a counterclaim for $15,000, alleging failure to perform the contract. This counterclaim was dismissed.

Following termination of the contract on October 4, 1983,

Software returned all equipment and parts that its suppliers would accept, it terminated temporary rentals of equipment, and it made an unsuccessful effort to replace Tesar's assigned use of the NCR 9300.

The main issue here is the proper measure of damages. Generally, "[t]he measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed." *May v. Marijo Corp.*, 207 Neb. 422, 424, 299 N.W.2d 433, 434 (1980).

Early in the evidence, the trial judge had a conference with counsel on the damages issue, saying,

> The only reason I wanted to know before going on with the testimony: it's my understanding this contract has not been completely performed by reason of unlawful termination. The measure of damages is not necessarily the contract price but is the value of services performed or the value of supplies furnished and the loss of anticipated profit. Is that your understanding of what the law is?

Counsel for Software did not disagree, and counsel for Tesar said, "[T]he contract was executory—or hadn't been fully performed and it was terminated, that the measure of damages was the out-of-pocket plus the profits that they could have received." It appears from the record that this theory of damages was followed during the rest of the trial, and Software did produce evidence showing $17,822.41 for out-of-pocket expenses.

"Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not." *Baum v. County of Scotts Bluff*, 169 Neb. 816, 827, 101 N.W.2d 455, 463 (1960); *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982).

After trial, the case was submitted on briefs, and a $5,195.20 judgment was entered against Tesar for these out-of-pocket costs and expenses:

2 months rental for computer	$2,190.60
2 months rental for software	200.00
Multiplexor expense	317.17

Modems	2,196.00
Plaintiff's cost for telephone jack	169.75
Installation of rented computer	121.68.

The second assigned error concerns the rule that Software had a duty to mitigate its damages. *Smith v. Erftmier, supra.* The record does not support Tesar's claim that the judge did not consider that issue. On the contrary, the judgment recites that the court, "having reviewed the evidence and trial briefs submitted herein finds for the plaintiff . . . ." Further, from the record the judge could find that Software had made a reasonable effort to mitigate its damages.

The third assigned error claims that there was error in the assessment of damages and that they were excessive. From the record and the circumstances here, the judge could find that the July 13, 1983, contract was binding upon both parties; that on October 4, 1983, Software was ready and able to perform the contract terms, which were still in force and binding upon both parties; that on October 4, 1983, Tesar terminated the contract by refusing permission to install computer equipment; that Software made a reasonable effort to mitigate its damages; that Software's claimed expenses were not business startup expenses but, rather, costs and expenses attributable to the July 13 contract incurred prior to termination; and that Software suffered reasonable out-of-pocket expenses and costs in that the rental of the computer and software was an effort to provide a temporary operational computer service to Tesar, and the sum of $2,190.60 was Tesar's share of the computer rental, the multiplexors and modems were required connecting equipment with the telephone transmission lines, and the two service charges of $169.75 and $121.68 were necessary in the installation process. There was no evidence that the judgment was excessive in that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law. *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985). There was no error in the $5,195.20 judgment against Tesar, and it was not excessive.

For the same reasons, Tesar's counterclaim was properly dismissed.

In its cross-appeal, Software argues that the measure of

damages should be the same as in the breach of contract for personal service, "the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned," *Lee v. Ralston School Dist.*, 180 Neb. 784, 785-86, 145 N.W.2d 919, 921 (1966), and that it should recover all of the unpaid monthly installments, amounting to $18,180, even though its proof included a total of out-of-pocket expenses of $17,822.41. There is no merit to the cross-appeal.

AFFIRMED.

FIRST NATIONAL BANK IN ORD, APPELLEE, V. JOHN M. GREENE ET AL., APPELLANTS.

413 N.W.2d 899

Filed October 16, 1987. No. 85-983.

Uniform Commercial Code: Security Interests: Notice: Guaranty. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

L.W. Kelly, Jr., of Kelly & Kelly, for appellants.

Robert E. Wheeler, for appellee.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiff-appellee, First National Bank in Ord (hereinafter Bank), brought this action in the district court for Valley

County, Nebraska, against defendants-appellants, John M. Greene and Lucille N. Greene, and others. The Bank sought to recover a deficiency judgment against these defendants under a guaranty contract. This is the second appearance of this matter in this court. The district court originally entered summary judgment in favor of the defendants. This court reversed that judgment and remanded the cause for further proceedings because fact questions existed as to the disposition of the collateral securing the original note. *First Nat. Bank v. Greene Bldg. & Supply*, 220 Neb. 205, 369 N.W.2d 59 (1985).

On remand, after trial to the court, judgment was entered against appellants on October 16, 1985, in the amount of $66,758.77 plus interest. On appeal, the appellants allege that the district court erred in finding that the Bank did not repossess the property, in finding that the sale of the property was conducted by the debtor, in finding that notice to the appellants of the sale was not necessary pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980), and in finding that the appellants had signed a valid and enforceable guaranty. For the reasons hereinafter set out, we affirm.

The evidence shows that on April 18, 1978, John and Lucille Greene executed an unlimited personal guaranty which unconditionally guaranteed payment to the Bank of all the debtor corporation's debts, whether then existent or later incurred. The other original defendants are not involved in this appeal. On March 22, 1979, the debtor executed a security agreement granting a security interest to the Bank in "All Machinery, Equipment (including automotive equipment) Furniture, fixtures, inventory, accounts rec. , contract rights, chattel paper, all tangible and intangible personal property, whether now owned or afteracquired, and all proceeds therefrom." On June 13, 1979, the debtor corporation gave the Bank an additional security interest in a truck-mounted crane. On January 30, 1981, an officer of the corporation executed note No. 60950 to the Bank in the amount of $113,087.30. This note was not paid off when due on April 30, 1981. As the company was unable to obtain alternative financing, a sale of the corporation's assets was ultimately held on June 1, 1981, resulting in a deficiency of $66,758.77. As we find that it was

not necessary to give notice of the sale to appellants under § 9-504(3), it is unnecessary to consider the other assignments of error.

It is well settled that a guarantor is a debtor within the meaning of Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) and is entitled to notice of the sale conducted by the creditor. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *Borg-Warner v. Watton*, 215 Neb. 318, 338 N.W.2d 612 (1983). This court has held, however, that where no security interest exists or is contemplated at the time the guaranty agreement is executed, the failure to give notice to the guarantor pursuant to § 9-504(3) is not a defense in an action against the guarantor. *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980). In *Peterson*, the guarantor signed an unconditional guaranty, similar to the type involved herein, guaranteeing the loans of a lumber company. The guaranty agreement was dated October 26, 1973. On October 31, 1973, the bank made a $12,000 loan to the lumber company. The bank subsequently advanced additional funds to the lumber company, resulting in a total indebtedness in excess of $60,000. The bank secured a portion of the later indebtedness by obtaining a security interest in the lumber company's inventory. As the loans were made in reliance on the guaranty agreement itself, we held that notice to the guarantor was not required. We held that where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.

The appellants argue that they are entitled to notice of the sale under *Borg-Warner v. Watton, supra*. In *Borg-Warner*, the inventory security agreement granted the creditor a lien on the debtor corporation's inventory before the guaranty agreement was executed. Additionally, the retail finance agreement provided that all contracts purchased by the debtor corporation were to be secured as a first lien upon the property. The facts of *Borg-Warner* indicated that the creditor did not contemplate making any unsecured loans to the debtor, and we held that the creditor was required to give the guarantor notice of the sale.

In the present case, however, the appellants signed an unconditional guaranty, guaranteeing the debts of Greene Building and Supply, Inc. The execution of the guaranty was a condition of credit extension from the Bank to the corporation. The guaranty agreement was executed in 1978, and the Bank did not obtain a security interest in the assets of the debtor corporation until 1979. There is no evidence that the parties contemplated that the debts guaranteed by John and Lucille Greene were secured debts. As in *Peterson*, the loans made by the Bank were made in reliance on the guaranty agreement itself.

Since the issue of notice is dispositive of this controversy, we need not consider the other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

COLWELL, D.J., Retired, concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. GEORGE E. CARTER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. VICTOR L. CARTER, APPELLANT.
413 N.W.2d 901

Filed October 16, 1987. Nos. 86-442, 86-445.

1. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
2. **Motions for Continuance: Appeal and Error.** This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
3. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt.
4. **Evidence: Hearsay: Witnesses.** A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
5. **Evidence: Hearsay: Witnesses: Appeal and Error.** It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be

upheld.

6. **Evidence: Appeal and Error.** If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
7. _____: _____. The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

William J. Elder of McCormack, Cooney, Mooney & Hillman, and Raymond J. Hasiak of Dowd, Fahey, Dinsmore & Hasiak, for appellants.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

The defendants, Victor L. Carter and George E. Carter, were charged in separate informations with first degree murder, with use of a firearm in the commission of a felony, and with being habitual criminals. In the trial court the cases were consolidated for trial. In this court they were consolidated for briefing and argument.

The jury returned verdicts of guilty, and the defendants were each sentenced to life imprisonment on the murder count and to a consecutive term of 10 years on the use of a firearm count.

On appeal the defendants contend that the trial court erred in overruling their motion to suppress identification testimony of Peggy Hatfield and Scott Reynolds, in failing to sustain their motion for a continuance, in failing to sustain their pleas in abatement, in permitting the State to introduce the preliminary hearing testimony of an absent witness, in that the trial was tainted with racial prejudice, in that numerous evidentiary rulings were erroneous, and in granting the State's motion in limine to suppress prior inconsistent evidence.

The record shows that the victim, Jeffrey R. Peterson, died as the result of being shot during the early morning hours of

October 9, 1985. A single .38-caliber bullet entered the left chest of the victim and penetrated both lungs and his heart.

The record further shows that between the hours of midnight and 1:30 a.m. on October 9, 1985, the deceased, Jeffrey Peterson, and his cousin, John Flynn, drove to the 19th and Lothrop Streets area in Omaha, Nebraska. They had been asked by a friend of theirs, Gerald Kincaid, to give a message to Janelle Anzalone to either call Kincaid or come to his house because Anzalone owed Kincaid money for pills she had purchased from him. Upon their arrival, Peterson and Flynn met two black males in a blue and white Cadillac parked in front of Anzalone's residence. Flynn inquired as to the whereabouts of Anzalone and was told by the person in the driver's seat that she was not around. During the conversation Flynn was threatened by someone in the Cadillac, and threats were made also against Kincaid or the Kincaid house. Later, Flynn was able to identify only one person in the Cadillac, that being Chester Carter, a brother of the defendants. Flynn could not positively identify Victor Carter as being present in the Cadillac and admitted that it was only his speculation that the individuals at 19th and Lothrop had anything to do with the later shooting.

After this attempt to contact Anzalone, Flynn and Peterson returned to Kincaid's residence at 39th and Young Streets and told Kincaid what had occurred. Peggy Hatfield, Scott Reynolds, and Ross Little were outside the Kincaid house, working on Flynn's car.

Just before 3 a.m. Hatfield, Reynolds, and Little decided to drive to a nearby convenience store for coffee and sandwiches. The three got into Hatfield's car, which was parked facing south on 39th Street. Before they pulled away from the curb, a car came up 39th Street, going north. Hatfield testified that the car contained two or three black males and that the car slowed down as it passed Kincaid's house. The car turned at the intersection of 39th and Young, backed up, and began to drive south on 39th Street. By this time Hatfield had also begun to drive south on 39th Street. The other car was now behind Hatfield and began honking its horn, so Hatfield pulled over to the curb. The car (later described by Reynolds as a blue/light

blue-gray Buick) pulled alongside Hatfield's car at about an arm's-length distance. The passenger in the car, whom Hatfield later identified as Victor Carter, pointed a gun toward Hatfield and asked if she knew Jerry Kincaid. She replied that she did not. Victor then said something to the effect of "[d]on't come messing around in our neighborhood or with our people." Hatfield again started to drive south on 39th Street. She looked in her rearview mirror and did not see the car following her. Hatfield drove to a phone booth on 30th Street, located 10 to 15 blocks away from the Kincaid residence. Reynolds made a phone call to the Kincaid residence and was told that Peterson had just been shot.

After Peterson and Flynn had returned from 19th and Lothrop, Kincaid received two or three unpleasant phone calls from Janelle Anzalone. During the second or third phone call, it was brought to Kincaid's attention that a blue car was coming around the corner. He looked out the window and said, "That's them," and then hung up on Anzalone. Flynn testified that Kincaid said, "They just went by" and that he (Flynn) understood Kincaid to mean the Carters. Flynn decided to go across the street to his grandmother's house, where he thought it would be safe, and indicated to Peterson to come with him.

As Peterson and Flynn walked out the front door, Flynn grabbed a baseball bat, and they began to walk through the front yard. When they were in the middle of the yard, the car came around the corner, sped up, and then slammed on its brakes. Flynn threw the bat toward the vehicle, but testified he did not know whether the bat hit the vehicle. Flynn saw muzzle flashes, heard a boom, and said, "Run, Jeff; they've got guns." Flynn ran back behind Kincaid's house, looked around the corner to see if anyone was coming, and then heard footsteps which he thought would be Peterson's. Instead, it was a friend of his named William Howard Thurman, saying that Peterson had been shot. Flynn never actually saw Peterson being shot, but did later identify the vehicle involved as a silver- or grayish-colored four-door Buick.

Later that morning, the Carter automobile was located in a motel parking lot near 39th and Dodge Streets. Flynn was brought to the parking lot and identified the Carter automobile

as being the same car involved in the shooting. Reynolds also identified the car as being the same one that pulled Hatfield's car to the side of the road. The vehicle was registered to Georgia Carter, the mother of the defendants.

Meanwhile, police officers were advised that the parties had left the building and were in an alley behind the motel. Officers Strong and Thuelen went to the alley behind the motel and arrested Victor Carter, Chester Carter, and Janelle Anzalone. George Carter was arrested by another officer in a bushy area around the corner from the motel. During his arrest, officers found a .38-caliber cartridge in George Carter's pocket, and 12 additional live .38 long rounds were found lying in the shrubbery.

That morning a lineup or "show up" consisting of Chester Carter, Victor Carter, and George Carter was conducted at the Central Police Station. Flynn identified Chester as one of the persons he saw in the blue and white Cadillac earlier that evening at 19th and Lothrop Streets. Reynolds identified Victor as the passenger in the front seat of the Buick that had pulled the Hatfield car over and also identified George as being a passenger in the back seat of that car. Reynolds later testified at trial that he was mistaken in his placement of George during the lineup and that George was actually the driver of the vehicle. Ross Little, also a passenger in the Hatfield car, identified Victor as the driver of the Buick and George as the passenger in the front seat. Hatfield identified Victor as the passenger waving a gun at her, but could not identify anyone else in the vehicle.

At the trial Kincaid testified that he had seen the shooting; that the blue car had stopped near the front of his house; that the passenger door flew open and a man jumped out, shooting a gun twice; and that then the driver jumped out and started shooting a gun four or five times. Kincaid identified the passenger as Victor and the driver as George.

The first assignment of error relates to the lineup identifications by Peggy Hatfield and Scott Reynolds. The defendants contend that Hatfield and Reynolds should not have been allowed to testify as to their previous identifications because the lineup was unduly suggestive and their testimony

was hearsay. No objections were made during trial to the testimony of either Hatfield or Reynolds. Therefore, the alleged error was not preserved for this court's review.

As stated recently in *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987), "[I]n a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." This holding was followed in *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987), where we refused to consider error assigned to the admission of evidence concerning Intoxilyzer test results because no objection was made to the evidence at the trial.

The same rationale applies in this case. No objection was made to prosecution inquiries regarding the lineup.

> As dictated by the Nebraska Evidence Rules, error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context.

Roggenkamp, supra at 920, 402 N.W.2d at 687.

The second assignment of error concerns the trial court's refusal to grant the request for a continuance. This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987); *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

Counsel for the defendants failed to comply with Neb. Rev. Stat. § 25-1148 (Reissue 1985), which provides that an application for continuance shall be by written motion and supported by affidavits setting forth the facts upon which the continuance is requested.

A failure to comply with § 25-1148 is relevant as to whether the trial court abused its discretion. In *Metschke v. Department of Motor Vehicles*, 186 Neb. 197, 200, 181 N.W.2d 843, 845 (1970), *overruled on other grounds Mackey v. Director of*

Department of Motor Vehicles, 194 Neb. 707, 235 N.W.2d 394 (1975), this court stated: "In the absence of a showing in conformance with section 25-1148, R.R.S. 1943, it is not error for the trial court to refuse to grant a continuance." In that case we found no abuse of discretion in denying the appellant's oral motion for a continuance (to secure additional witnesses) because there was no showing made as to what evidence would be procured by calling additional witnesses, no showing of materiality, and no showing of any other matters pertinent in support of the motion.

A similar finding was made in *Stastny v. Tachovsky*, 178 Neb. 109, 132 N.W.2d 317 (1964), holding there was no error in denying a motion for a continuance where an oral application was made the morning of the trial, no written application was made, and the parties seeking the continuance had sufficient time to prepare for trial. See, also, *Vlcek v. Sutton*, 201 Neb. 555, 270 N.W.2d 906 (1978).

In the present case, no written application was made, and no affidavits were filed to support a claim of prejudice if the continuance were not allowed. The defendants base their request on the fact that the prosecution witness Kincaid changed his previous statement and claimed to be an eyewitness to the shooting. The record shows that the defense counsel learned of the changed statement approximately 2 weeks before the start of the trial, they were given copies of the new statement, and they had full opportunity to cross-examine the witness at trial. These facts show there was no abuse of discretion in overruling the motion for a continuance.

In their third assignment of error, the defendants contend the trial court erred in overruling their pleas in abatement because the evidence adduced at the preliminary hearing was not sufficient to bind them over.

Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt. *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986).

At the trial, the State was allowed to introduce the testimony of Ross Little received at the preliminary hearing. The

defendants' fourth assignment of error is that the trial court erred in finding that Little was unavailable as a witness.

On March 28 or 29, 1986, Officer James C. Wilson of the Omaha Police Division was instructed to locate Little for the trial. Officer Wilson learned that Little was living in Oregon, contacted the local police in Oregon, and obtained the address and phone number of Little's father. Officer Wilson spoke with the father and left a message to have Little call him. One or two days later, Little returned the call and was told that he was needed as a witness. Little was told that his transportation to Omaha would be paid.

While arranging for an airline flight, Officer Wilson discovered an outstanding felony warrant for Little. Officer Wilson then called Little and told him about the warrant. Little was aware of this warrant, but was willing to return to Nebraska anyway.

Sometime later Officer Wilson told Little's father that his son would be arrested when he came back to Nebraska. Officer Wilson then contacted the local police in Oregon and requested that they arrest Little on a fugitive charge. As of April 4, 1986, the day Officer Wilson testified, Little had not been found.

Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1985) provides that a witness is unavailable if "the proponent of his statement has been unable to procure his attendance by process or other reasonable means." A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial. *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984).

The issue here is whether the prosecution, through the efforts of Officer Wilson, made a good faith effort. Officer Wilson first tried to bring back Little voluntarily. When questioned as to why no attempt was made to immediately arrest Little, and instead giving him a chance to come back on his own, Officer Wilson testified, "My information is it would be much easier to get him back here willingly rather than having to extradite him. It's a long process."

It is within the sound discretion of the trial court whether unavailability has been shown. Absent a showing of an abuse of

discretion, the trial court's decision will be upheld. *State v. Wiley*, 223 Neb. 835, 394 N.W.2d 641 (1986); *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984).

In this case, the admission of Little's testimony from the preliminary hearing was at most harmless error. "If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal." *State v. Klingelhoefer*, 222 Neb. 219, 224, 382 N.W.2d 366, 370 (1986); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *overruled on other grounds State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Little's testimony at the preliminary hearing was that he was a passenger in a car driven by Peggy Hatfield, that a blue car came up from behind and flashed its lights, and that Hatfield stopped and pulled over. One of the occupants of the car asked if they knew Jerry Kincaid, to which they responded they did not. Little's testimony differed from the testimony of the other witnesses only in that at the lineup he placed Victor as the driver and George as the passenger. The record shows that the testimony of Peggy Hatfield and Scott Reynolds established basically the same facts as the testimony of Little. Any error in the ruling regarding unavailability was at most harmless error.

The defendants' fifth assignment of error is that the trial was tainted with racial prejudice. The record does not support this contention.

We have examined the record concerning each of the evidentiary rulings complained of and find that they were not erroneous or not prejudicial. The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion. *State v. Ryan, ante* p. 59, 409 N.W.2d 579 (1987); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

The final assignment of error is that the trial court erred in granting the State's motion in limine to suppress evidence of an incident a few months prior to the shooting, where John Flynn threatened a neighbor with a gun. The defendants contend the evidence should have been admitted to impeach Flynn's testimony that he did not own a gun. The trial court refused to

admit the evidence because it related to a collateral matter. We find no abuse of discretion.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD ALDRICH, APPELLANT.
413 N.W.2d 639

Filed October 16, 1987. No. 86-826.

Indictments and Informations. The district court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Francis O'Brien, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Richard Aldrich, defendant, appeals his conviction of first degree sexual assault, Neb. Rev. Stat. § 28-319 (Reissue 1985), assigning one procedural error, that the court abused its discretion in allowing the State, at the conclusion of all evidence, to amend its information by deleting one word, "and," and substituting the word "or," making the charge read in the disjunctive. We affirm.

Section 28-319 provides:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the

nature of his or her conduct, or (c) . . . .

The material parts of the information after amendment recited:

> Richard Aldrich, defendant . . . did subject another person to sexual penetration and did overcome the victim by force, threat of force, express or implied, coercion, or deception *or* knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his conduct, to-wit: sexual assault of [the victim], Schuyler, Nebraska, age 17 years, a violation of Section 28-319, of the Revised Statutes of the State of Nebraska . . . .

(Emphasis supplied to show amendment.)

Since Aldrich does not contend that there was a failure of proof, the facts are stated briefly. In September 1985, Aldrich was living in Schuyler, Nebraska, with the 17-year-old victim and her mother. The victim's tested IQ was about 68, and there was expert evidence placing her intelligence in the range of that of an 8- to 10-year-old child. The evidence clearly establishes the act of sexual penetration, and the jury could find that it was accomplished as charged in the information.

"[T]he District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced." *State v. Gascoigen*, 191 Neb. 15, 20, 213 N.W.2d 452, 455 (1973).

The facts here are similar to those in *State v. Davis*, 195 Neb. 361, 237 N.W.2d 885 (1976). Defendant's conviction there was affirmed upon an instruction submitted to the jury in the disjunctive, without any amendment of the operative information that charged him in the conjunctive.

The information upon its face in both forms was sufficient to charge a crime under § 28-319, since the crime is charged in the language of the statute and it informed defendant, with reasonable certainty, of the charges made against him. See *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985). Further, the amendment did not charge either an additional or a different offense.

The amendment was no surprise to Aldrich, since the record shows that several days prior to trial he was aware of the technical defect here discussed. His failure to challenge the information before trial by a motion to quash, Neb. Rev. Stat. § 29-1808 (Reissue 1985), was a waiver of that technical defect. *State, ex rel. Gossett, v. O'Grady*, 137 Neb. 824, 291 N.W. 497 (1940); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

No prejudice to defendant is shown, and the trial judge did not abuse his discretion in granting the amendment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD E. WILLIAMS, APPELLANT.

413 N.W.2d 907

Filed October 16, 1987. No. 86-1049.

1. **Directed Verdict: Convictions.** A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained.
2. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
3. **Homicide: Intent.** A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
4. _____: _____. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Lisa Martin-Price, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant, Ronald E. Williams, was charged with first degree murder and use of a firearm in the shooting death of Eric W. Holmes. Following a jury trial the defendant was found guilty of second degree murder and use of a firearm to commit a felony. He was sentenced to 20 years' imprisonment on the murder count and 3 years' (consecutive) imprisonment on the firearm charge.

On appeal the defendant's sole assignment of error is that the evidence was insufficient to sustain the conviction and that, therefore, the trial court erred in not sustaining his motions for a directed verdict and to dismiss the case. He argues that under the facts of this case it is clear as a matter of law that he was acting in self-defense and therefore the shooting was justified.

A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained. *State v. Dwyer, ante* p. 340, 411 N.W.2d 341 (1987); *State v. Meints*, 225 Neb. 335, 405 N.W.2d 15 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction. *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987).

Neb. Rev. Stat. § 28-304 (Reissue 1985) provides in part that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

The state of mind required for second degree murder may be inferred from the evidence of the criminal act. *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

The record shows that on April 12, 1986, the victim, Eric Holmes, was living at Tim Agee's home at 4945 Manderson Street in Omaha, Nebraska. That evening a group of friends gathered at Agee's home for a get-together. Those at the party were Agee, Timothy Prince, Kelly Tibbs, Holmes, and Holmes' girlfriend, Michelle Tibbs. By around 11:30 p.m. everyone had left the house except for Holmes and Michelle.

Holmes and Michelle began to argue over possession of a blanket. Holmes told Michelle to get out and walk home, which she began to do. As she walked east up Manderson Street, she heard Holmes walking behind her. He caught up with her, and they again began to argue. Holmes grabbed her and tried to pull her back toward his house, but she pulled the other way. Holmes pushed her to the ground near a tree in front of the Roy Tipler home at 4828 Manderson Street and sat on top of her. Michelle began to cry and told Holmes to get off.

John Hudson and his mother, Linda Johnson, lived next door to Tipler. Hudson was hosting a birthday party for his girlfriend, Barbara Lawson, which the defendant, Ronald Williams, was attending. Hudson became aware of the altercation outside between Holmes and Michelle after several people complained to him. Hudson went outside and heard a woman gagging. He walked up the sidewalk to the tree and saw Holmes on top of Michelle. He told Holmes the police were coming and to get up and leave. Holmes did not get up, but remained on top of Michelle for approximately 3 more minutes. By this time other people had come outside to see what was happening. Holmes got off Michelle and stood up. Holmes and Michelle then walked east toward the Hudson home. By this time the defendant was also outside and heard Hudson and another man, Antonio Alexander, telling Holmes to leave. The defendant also heard Hudson's mother, Linda Johnson, tell Holmes to leave. Holmes replied to Johnson, "Fuck this shit, I'm not going anywhere, ain't nobody going to make me." Johnson told Holmes he had done enough already, to which he

replied that "he ain't done nothing yet."

The defendant then stepped in and told Holmes to leave. Holmes and the defendant began arguing back and forth. The defendant tried to go toward Holmes, but Hudson and Alexander restrained him. The defendant was then approximately 10 feet away from Holmes. The defendant appeared to calm down, so Hudson and Alexander let go of him. Holmes began walking west toward his house, but was walking backward so that he was still facing the defendant to the east.

They continued to exchange words, and when Holmes was approximately three to four houses away, Hudson and Alexander again had to restrain the defendant from going after Holmes. They were successful in restraining the defendant, so they again let go of him. Holmes, still walking backward, said, "Let him go. I got something for him." The defendant went toward Holmes again. Hudson tried to grab the defendant, but he broke away and ran up Manderson Street toward Holmes. At this point Holmes was in front of the home of Steven and Judy Gregory at 4848 Manderson, which was estimated to be around 100 yards from the tree in the Tipler yard where the Holmes-Michelle altercation took place.

The Gregorys had heard this altercation and had called 911 to report the disturbance. Judy Gregory testified that she and her husband were standing in the front doorway of their home watching Holmes and the defendant. She saw Holmes turn toward the defendant as the defendant came up from behind him. She saw Holmes put his hands up in the air and heard him say, "Man, I don't have anything." She then saw the defendant shoot Holmes. Holmes pulled up his shirt, looked at his chest, and said, "Man, you didn't have to shoot me." Holmes turned and ran west toward his house, while the defendant went east back toward the party. Judy Gregory testified that she never saw any kind of weapon in Holmes' possession. Steven Gregory also testified that he had seen Holmes with his hands in the air and that Holmes shouted, "I don't have anything" just before he was shot.

Others who were in front of the Hudson home gave a different version of the events in front of the Gregory home.

Bertha Jones testified that as the defendant approached Holmes, Holmes put his hand toward his jacket pocket and was bringing his hand back out when he was shot. Barbara Lawson testified Holmes did not put his hands in the air, but instead was bringing his hand toward his body when the defendant shot him. The defendant testified that Holmes had put his hand in his pocket and that he, the defendant, shot Holmes as Holmes was bringing his hand back out of his pocket. He also testified that he never saw a weapon on Holmes.

About 1:30 a.m. Timothy Prince went back to the Agee house and found Holmes lying on the couch with a bullet hole in his chest. The police were called, and Holmes was later pronounced dead.

Although the evidence was in conflict, it was sufficient to sustain a finding of guilty beyond a reasonable doubt. Taking the view of the evidence most favorable to the State, the evidence supports a finding by the jury that the defendant intentionally shot Eric Holmes. Two of the eyewitnesses to the shooting each testified that Holmes had his hands in the air and had stated, "I don't have anything" immediately prior to being shot. The defendant himself testified he never saw a weapon on the victim. This evidence was sufficient to support the conviction, and the judgment of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND TULLY, APPELLANT.
413 N.W.2d 910

Filed October 16, 1987. No. 86-1106.

1. **Pleas: Trial: Time.** In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
2. **Homicide: Lesser-Included Offenses: Proof.** Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater.

Therefore, evidence which proves first degree murder proves the existence of second degree murder.

3. **Criminal Law: Appeal and Error.** Error without prejudice does not provide a ground for the reversal of a criminal conviction.
4. **Mental Competency: Pleas: Trial.** A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
5. _____: _____: _____. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
6. _____: _____: _____. Mental retardation does not necessarily imply incompetence to plead or stand trial.
7. **Mental Competency: Pleas: Trial: Appeal and Error.** The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
8. **Postconviction: Proof.** One seeking postconviction relief bears the burden of establishing the basis for such relief.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

John F. Sheaff and Roy A. Sheaff of Sheaff Law Offices, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

On February 9, 1962, defendant-appellant, Raymond Tully, pled guilty to second degree murder and was thereafter, on February 14, 1962, sentenced to life imprisonment. More than 24 years later, on June 5, 1986, he filed a motion for postconviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Following an evidentiary hearing, the motion was denied. In this appeal Tully urges that the district court erred in failing to overturn his conviction because (1) his plea was accepted without amendment to the information charging him with first degree murder, (2) his plea was not made knowingly, intelligently, and voluntarily, (3) he was not competent to plead, and (4) there was

no presentence investigation or other determination of his background prior to imposing sentence. We affirm.

The record reflects that the information charged Tully with first degree murder, alleging that he "feloniously, purposely, and of his deliberate and premeditated malice" killed his father. At the arraignment Tully's attorney advised the judge and prosecutor that his client was willing "to enter a plea of guilty to second degree murder." In response to a question by the judge, Tully said he understood. A series of questions between Tully and his attorney establishes that he and Tully had discussed the possibility of standing trial on the charge of first degree murder or of pleading guilty to a charge of second degree murder and that the attorney had explained the penalties for each offense to Tully. In response to the judge's inquiry Tully's attorney said he had no doubt Tully was then sane and was so at the time of the crime.

Psychiatric reports entered in evidence at that hearing establish that Tully told an examining psychiatrist that he had confessed killing his father to the authorities and that he had been having arguments with his father over a period of 2 years, hated him, and had purchased a rifle some 2 weeks prior to the shooting should his father make him "mad enough to use it." On the day of the shooting, Tully and his father, while working together all day, had argued over a number of things, including Tully's previously undisclosed membership in a flying club. During these arguments, the father had threatened to smash the club's plane. After they quit working, Tully had dinner with his parents, and later left to run errands. At the conclusion of his errands, Tully picked up the rifle, which he had hidden in an empty house, arrived back home at about "1:30 P.M. [sic]," cut the telephone wires, and shot his father in the head. Tully then "ditched" the rifle in a nearby vacant house. According to Tully, he was still angry, particularly over his father's threat to damage the plane, as Tully had always had an interest in flying, to the displeasure of his father. Tully, who was then 36 years old, later stated that at the time of the shooting he was so confused that he did not know the difference between right and wrong.

Tully had quit school when he was 16 years old and had finished the eighth grade. The examining psychiatrist

concluded Tully was mildly mentally retarded, having a measured intelligence quotient of 81. He had "many schizoid features" and partially "disassociated" while under stress. In this examiner's opinion it was "entirely possible" that Tully was not responsible for short periods of time while under stress and that there was "a reasonable doubt" as to whether Tully could "be classified as being sane at the time that he became involved with the shooting of his father."

Upon the prosecutor's statement that he had no objection, the judge accepted Tully's plea to second degree murder. The information was not amended at any time.

The prosecutor told the judge that Tully had no prior criminal record of consequence, the only thing being that Tully and another man once broke some windows at a pool hall. The judge deferred sentencing for 5 days, saying he wanted to visit with Tully in the presence of his attorney and the prosecutor. The record does not reflect what was said during that visit, if it took place.

When asked at the sentencing hearing whether Tully had anything to say as to "why sentence should not be pronounced," his attorney replied that "defendant has no statement to make."

We begin by noting that the merits of Tully's assignments of error are, in general, to be determined by the law as it existed when his plea was accepted. *State v. Bevins*, 187 Neb. 785, 194 N.W.2d 181 (1972).

Tully's first assignment of error rests upon the premise that the failure to amend the information constituted reversible error per se. Tully has failed to cite us to any authority in support of this premise; indeed, quite the contrary is true. In *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947), an appeal from a conviction under Neb. Rev. Stat. § 28-402 (1943), we held that if the information charged murder in the first degree, a conviction of murder in the second degree could be sustained. Later, *Wolff v. State*, 172 Neb. 65, 108 N.W.2d 410 (1961), taught that a plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order, and its effect is to authorize the imposition of the sentence prescribed by law. Reading *Moore* and *Wolff* together, we learn that under

the law as it existed in 1962, a plea of guilty to second degree murder was properly entered in response to the information, which had charged first degree murder.

Tully next assigns as error the more general complaint that the trial court's failure to amend the information before accepting his guilty plea constituted a "failure to inform him of the nature and elements of the offense with which he was charged and . . . failure to assure that [his] guilty plea was voluntary." Brief for Appellant at 5. We will treat these two aspects of Tully's second assignment of error individually.

Tully's first contention has no merit under the law as it existed in 1962. The relevant homicide statutes in effect at the time were Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956), which read in relevant part as follows:

> 28-401. . . . Whoever shall purposely and of deliberate and premeditated malice . . . kill another . . . shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.
>
> 28-402. . . . Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another . . . shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life.

A comparison of the foregoing language reveals that, but for the fact that second degree murder does not require deliberation and premeditation as does first degree murder, the elements of the two crimes are identical. Tully does not claim that he did not know the elements of first degree murder. As *Moore v. State, supra*, points out, the previously cited statutes define degrees of the single crime of homicide. The unlawful killing constitutes the principal fact, and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence

of second degree murder. Thus, while it would certainly have been better procedure to have amended the complaint, it cannot be said that Tully suffered any prejudice by being permitted to plead guilty to a lesser degree of the crime charged in the information. This assignment of error is thus resolved by the rule that error without prejudice does not provide a ground for the reversal of a criminal conviction. *Svehla v. State*, 168 Neb. 553, 96 N.W.2d 649 (1959).

Tully next argues that the failure to amend the information renders his guilty plea involuntary, and therefore void, under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which holds that the waiver of federal constitutional rights cannot be presumed from a silent record; in order for a plea of guilty to stand, it must not only have been intelligently and voluntarily entered, but the record must affirmatively disclose it to have been such.

Tully acknowledges, however, that the principles enunciated in *Boykin* apply prospectively and not retroactively. *Brown v. Swenson*, 487 F.2d 1236 (8th Cir. 1973); *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977). In *Brown*, the circuit court specifically held the *Boykin* requirements did not apply to a plea entered in 1964 and that the determinative question was whether under the totality of the circumstances the pre-*Boykin* plea was entered knowingly and voluntarily. See, also, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

This court announced the procedures to be used in accepting pleas of guilty in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971). *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), extended the *Boykin-Turner* rule for prospective application to all offenses for which a defendant may be imprisoned, be they felonies, misdemeanors, or traffic infractions. The procedure for taking guilty pleas was clarified further in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and now requires that in order to support a finding that a plea of guilty has been freely, intelligently, voluntarily, and understandingly entered, the record must show that the court (1) informed the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege

against self-incrimination; and (2) examined the defendant to determine that he or she understood the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.

Thus, while the plea might not pass constitutional muster today, a matter we do not decide, the question is whether under the totality of the circumstances it can be said the plea was knowingly and voluntarily entered under the law as it existed in 1962. The record tells us Tully was represented by counsel, a factual basis for the plea existed, he had confessed to killing his father, he had been told the penalty for second degree murder as well as for the greater crime with which he was charged, and he himself told the judge he understood he was pleading guilty to the lesser offense. Tully had sufficient information to understand that by pleading guilty to second degree murder he removed the risk of being sentenced to death for the killing. Under those circumstances, we conclude that if Tully was competent to plead, the plea was a knowing and voluntary one.

This brings us to Tully's third assignment, wherein he urges there was error in failing to find he was not competent to enter a plea of guilty.

The present law is that a defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. The issue of competency is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court. Mental retardation does not necessarily imply incompetence to plead or stand trial. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding. *State v. Davis*, 224 Neb. 771, 401 N.W.2d 165 (1987).

We have neither been referred to nor found any Nebraska law to suggest that the rules were otherwise when Tully entered his plea. We therefore apply the foregoing rules to the plea before us and conclude that the exchanges between Tully and

the judge in accepting his plea, coupled with the court's observation of Tully's exchanges with his attorney, are sufficient to support the trial court's implicit finding that Tully was competent to plead.

In his final assignment Tully claims the trial court erred in failing to order a presentence investigation or to otherwise adequately inform itself about his background.

At the time of Tully's conviction Neb. Rev. Stat. § 29-2217 (Reissue 1956) provided:

> In all cases of criminal prosecution, whenever any person shall have been found guilty, by verdict of a jury, or by his plea of guilty duly entered in the cause, of any misdemeanor or any felony, *except murder, treason, or forcible rape*, it shall be the duty of the court in which such cause is pending to ascertain, if practicable, through the agency of a probation officer or otherwise, the age of the accused, whether the offense of which he is found guilty by such verdict is his first offense, the extent of the moral turpitude involved in the act committed by the accused, and such other facts and circumstances relating to the accused as he may desire to know.

(Emphasis supplied.) Clearly, this statute imposed no duty on the court to investigate prior to announcing sentence, as the crime to which Tully had pled guilty was specifically exempted from its embrace.

The level of Tully's education and intelligence and the fact that he had no past criminal record were known by the court. Tully does not tell us what additional information helpful to him any further investigation of his background would have revealed. This assignment is therefore controlled by the rule that one seeking postconviction relief bears the burden of establishing the basis for such relief. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987). No such basis has been established.

There being no merit to Tully's assignments of error, the judgment of the district court denying postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. THOMTE, APPELLANT.

413 N.W.2d 916

Filed October 16, 1987. No. 87-052.

1. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
2. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
3. **Drunk Driving: Investigative Stops: Probable Cause.** A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
4. **Police Officers and Sheriffs: Drunk Driving: Witnesses.** A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James E. Schaefer, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The appellant, Dennis L. Thomte, was charged with operating a motor vehicle while he was under the influence of alcohol or when he had ten-hundredths of 1 percent or more by

weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). Having been convicted of that charge in the county court for Douglas County, Thomte appealed his conviction to the district court for Douglas County, which affirmed the county court's judgment of conviction.

At approximately 11 p.m. on April 25, 1986, Sgt. Timothy Cavanaugh was driving his cruiser southbound in moderate traffic on Interstate 680 within Omaha, which highway has two marked lanes for southbound traffic. Cavanaugh, driving in the left lane, approached other southbound vehicles in the right lane. As Cavanaugh began to overtake a Cadillac, which was being followed by other vehicles, the Cadillac made a sharp weave from right to left within the right lane but did not cross into the left lane occupied by Cavanaugh's cruiser. Cavanaugh reduced his cruiser speed to approximately 45 miles per hour and pulled into the right lane, ahead of traffic which was still following the Cadillac. During his observation of the Cadillac as it traveled 16 blocks, or a little over 1 mile, on I-680, Cavanaugh saw the Cadillac again weave within the right lane of traffic and, as the Cadillac was about to exit from the Interstate, activated the cruiser's red rotating lights. The Cadillac pulled to the right shoulder of the road and stopped. Cavanaugh parked his cruiser directly behind the Cadillac and then approached the vehicle, where he found Thomte inside and alone. Illumination at that point was provided by Cavanaugh's flashlight and street lamps on the Interstate. When he arrived at the Cadillac, Cavanaugh asked for Thomte's driver's license and the vehicle registration. Thomte told the officer that he was tired, and the officer observed that Thomte's "speech was very slurred and thick-tongued, mumbled, if you will. And I noticed a moderate odor of alcohol" on Thomte's breath.

Cavanaugh asked Thomte to get out of the Cadillac and perform some field sobriety tests. When Thomte said he knew the alphabet, he attempted to recite the alphabet, but, according to Cavanaugh: "He got through the letter 'N', with no problems, and then he just jumbled the rest, so I couldn't

make out what letters he was saying. So I asked him to repeat. He got to the letter, 'H', and just stopped." Thomte was then asked to perform a balance test, where Thomte stood on his left leg and, while so standing, would attempt to swing his right leg forward and backward. Thomte lost his balance during three unsuccessful attempts at such balance test. In another field sobriety test, the finger-to-nose test, where the subject extends both arms and then attempts to touch his nose with the index finger of each hand, Thomte satisfactorily touched his nose with the index finger of his left hand but missed his nose in the attempt with his right hand. Because it started to rain, Thomte and Cavanaugh got into the cruiser, and Cavanaugh summoned another officer to administer an "Alco-Sensor" test. Shortly thereafter, an Officer Siebken arrived and administered the Alco-Sensor test. Cavanaugh placed Thomte under arrest and transported him in the cruiser to Central Police Station for the purpose of a breath test through an Intoxilyzer Model 4011AS, which was administered by a police department technician.

Cavanaugh testified that, during his 5 1/2 years on the police force, he had observed the conduct of people who had consumed alcohol, had made several hundred arrests for drunk driving, and had made arrests for many offenses other than drunk driving committed by persons who had consumed alcohol. Also, Cavanaugh testified concerning Thomte's physical appearance when he encountered Thomte on the Interstate and Thomte's inability to perform most of the field sobriety tests. During further testimony, Cavanaugh related events at the police station after Thomte had been advised of his *Miranda* rights. As testified by Cavanaugh, Thomte said he had been drinking since 6 p.m. and had consumed three glasses of wine. Cavanaugh expressed his opinion that Thomte was under the influence of alcohol at the time the officer stopped the Thomte vehicle on the Interstate. On cross-examination, Cavanaugh testified that Thomte had stated that he was taking medication, Calan. The technician who had administered the Intoxilyzer test testified that the Intoxilyzer's digital readout was ".135."

Thomte testified that he had three or four glasses of wine but had ceased drinking any alcohol at least 1 1/2 hours before he

was arrested by Cavanaugh. Thomte generally disagreed with Cavanaugh's description of events on the Interstate leading up to the arrest, and testified that Calan contains acetone. Thomte also testified that he was not under the influence of alcohol when stopped by Cavanaugh. In rebuttal, the State recalled the technician who administered the Intoxilyzer test, and the technician testified that any acetone would cause the Intoxilyzer to cancel the test being administered if acetone is present in the breath sample sufficient to affect the test. At the conclusion of the evidence, the court stated: "The Court finds the defendant guilty." On appeal to the district court, the county court's judgment was affirmed. Thomte now appeals to this court.

Thomte alleges that the trial court erred in (1) not finding that the investigatory stop occurred without probable cause; (2) not finding that the search and seizure was unreasonable and without probable cause; (3) not finding that there was insufficient evidence to find Thomte guilty beyond a reasonable doubt; (4) admitting the results of the preliminary breath test; and (5) accepting the results of the breath test without adjusting it so as to give Thomte the benefit of the margin of error.

Thomte first argues that the initial stop of his vehicle was without probable cause. However, Thomte's roadside detention is more accurately classified as a stop and search situation subject to the guidelines pronounced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), where the U.S. Supreme Court said: "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 22. See, also, *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983); *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981). An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986); *State v. Ebberson, supra*.

> Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

State v. Ebberson, supra at 44-45, 305 N.W.2d at 907. Sergeant Cavanaugh testified he observed Thomte's vehicle twice weaving within its lane of traffic. We hold that a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, § 39-669.07. Courts in other jurisdictions have reached the same conclusion regarding an officer's observation of a vehicle weaving within its own lane of traffic. See, *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986); *State v. Ellanson*, 293 Minn. 490, 198 N.W.2d 136 (1972); *State v. Dorendorf*, 359 N.W.2d 115 (N.D. 1984); *State v. Bailey*, 51 Or. App. 173, 624 P.2d 663 (1981). Sergeant Cavanaugh had " 'a particularized and objective basis for suspecting the person stopped of criminal activity.' " *State v. Daniels*, 220 Neb. 480, 482, 370 N.W.2d 179, 181 (1985). The initial stop of Thomte's car was justified, and, therefore, his first assignment of error is of no merit.

Thomte next argues that the field sobriety tests constituted a search and seizure and were conducted without probable cause. Sergeant Cavanaugh testified, however, that appellant's eyes were glazed, his speech was slurred, and Thomte had a moderate odor of alcohol about him. Cavanaugh's observations of Thomte were no different from any view of Thomte's general physical characteristics which are "in the

plain view of an officer who has a right to be in the position to have that view." *Harris v. United States*, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968). See *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973). Relying on *People v. Carlson*, 677 P.2d 310 (Colo. 1984), Thomte argues that roadside sobriety testing constitutes a full search and seizure and therefore must be supported by probable cause. Other jurisdictions, however, have held that administering roadside sobriety tests is more analogous to a limited *Terry* stop than to a formal arrest and may be justified by an officer's reasonable suspicion, based on specific articulable facts, that the driver is intoxicated. See, *State v. Superior Court, supra; Oregon v. Niles*, 74 Or. App. 383, 703 P.2d 1030 (1985). Cf. *State v. Stevens*, 394 N.W.2d 388 (Iowa 1986) (cases cited therein). Under the circumstances, we need not decide whether roadside sobriety tests must be supported by probable cause, because even under the more stringent standard applied in *People v. Carlson, supra*, namely, that probable cause is required for field sobriety tests, probable cause existed in the present case. In *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), this court held that an officer's observations of a motorist's bloodshot eyes, slurred speech, and breath with the odor of alcohol constituted probable cause for a valid warrantless arrest for drunk driving. Since we have decided that the initial stop of Thomte was based on reasonable suspicion, the officer's additional observations of Thomte constituted probable cause for believing that appellant was driving while under the influence of alcohol, and, therefore, the sobriety tests were reasonable under the circumstances. Thomte's second assignment of error is without merit.

In connection with his third assignment of error, namely, that there is insufficient evidence to support his conviction, Thomte argues that the trial court erred in permitting Sergeant Cavanaugh to express his opinion as to whether or not Thomte was intoxicated. Thomte objects on the grounds that Cavanaugh lacked sufficient foundation for his opinion and, further, that the officer's opinion is not supported by the evidence. Cavanaugh testified, however, that he had observed the conduct of people who had consumed alcohol and that in

his 5 1/2 years as an officer he had made several hundred drunk driving arrests. His testimony was based on personal observations of Thomte. We have often held that a police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based. See, *State v. Warnke*, 221 Neb. 625, 380 N.W.2d 241 (1986); *State v. Daniels, supra; State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983). The opinion testimony of Sergeant Cavanaugh was properly received.

Thomte maintains there was insufficient evidence to support his conviction.

> "[I]n determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . ."

State v. Moore, ante p. 347, 352, 411 N.W.2d 345, 350 (1987).

"As used in § 39-669.07, the phrase 'under the influence of alcoholic liquor' means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner." *State v. Burling*, 224 Neb. 725, 728, 400 N.W.2d 872, 875 (1987). Sergeant Cavanaugh's testimony supplies ample evidence to support the finding that Thomte was driving his automobile while he was under the influence of alcoholic liquor.

We have previously held that, even discarding the Intoxilyzer breath test results, a police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. See, *State v. Burling, supra; State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977). That is also our conclusion in this case. Further,

> "[I]n a case tried to the court without a jury, there is a

> presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment."

State v. Moore, supra at 352-53, 411 N.W.2d at 350. Having decided Sergeant Cavanaugh's testimony is sufficient to sustain Thomte's conviction, we find it unnecessary to address Thomte's fourth and fifth assignments of error, relating to the admission of the breath test results as evidence.

The judgment of conviction is supported by sufficient evidence and is affirmed.

AFFIRMED.

WESLEY R. HEUSMAN, APPELLANT, V. HOLLY JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

414 N.W.2d 247

Filed October 23, 1987. No. 85-819.

1. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** *Miranda* warnings are not required prior to an officer's request of a driver to submit to a chemical analysis under the Nebraska implied consent law.
2. **Implied Consent: Right to Counsel: Blood, Breath, and Urine Tests.** The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
3. **Constitutional Law: Implied Consent.** Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
4. **Implied Consent: Licenses and Permits: Revocation: Proof: Appeal and Error.** In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
5. **Implied Consent: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the order of the district court, affirming the order of the director of the Department of Motor Vehicles, revoking Wesley R. Heusman's motor vehicle operator's license under Nebraska's implied consent law.

In his brief to this court appellant asserts that *Miranda* warnings should have been read to him, that he had a right to counsel prior to deciding whether to submit to a chemical test, that the implied consent statutes are unconstitutional, that he should not have been required to bear the burden of proof, and that he was entitled to be advised of his right to have an independent test of his body fluids conducted by a physician of his choice.

We note first that counsel for appellant abandoned his brief at oral argument. It is therefore unclear whether any of the appellant's assignments of error were preserved. Without deciding this issue, we note further that each of the above questions has recently been examined and decided by this court in a manner inconsistent with the appellant's position.

In *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), we reaffirmed our position that *Miranda* warnings are not required prior to a request to submit to a chemical analysis under the Nebraska implied consent law. We also reasserted holdings from prior cases that under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test.

Appellant's constitutional argument, that Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is both vague and overbroad because it does not expressly define "reasonable," was also raised and rejected in *Fulmer*.

In *Wietjes v. Jensen*, 221 Neb. 579, 379 N.W.2d 734 (1986), and, additionally, in *Mackey v. Director of Department of*

Motor Vehicles, 194 Neb. 707, 235 N.W.2d 394 (1975), we have held that the burden is on the appealing licensee to prove the invalidity of the revocation order.

Additionally, the appellant contends that the order of the district court should be reversed because no evidence was offered to indicate that an officer was present who was certified to operate the testing device. While this might present a defense to the criminal charge of driving while intoxicated, it does not constitute a justifiable, reasonable excuse for refusing to submit to the test.

Finally, in *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986), we reaffirmed our position that Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.

For these reasons, the appellant's contentions are without merit, and the order of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF SILVEY REFRIGERATED CARRIERS, INC. SILVEY REFRIGERATED CARRIERS, INC., APPELLANT, V. BEE LINE MOTOR FREIGHT, INC., ET AL., APPELLEES.

414 N.W.2d 248

Filed October 23, 1987. No. 85-928.

1. **Public Service Commission: Appeal and Error.** In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
2. **Motor Carriers.** In determining whether a carrier's operation in hauling goods between points in one state through another state is a subterfuge, courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or dominant character

of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling as to the outcome.

3. _____. A logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and does not indicate subterfuge to avoid state regulation.
4. **Public Service Commission: Motor Carriers: Proof.** The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
5. _____: _____: _____. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
6. _____: _____: _____. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.

Appeal from the Nebraska Public Service Commission. Affirmed in part, and in part reversed.

Marshall D. Becker and Robert M. Cimino, for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellees.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

Silvey Refrigerated Carriers, Inc., has appealed from the order of the Nebraska Public Service Commission which denied its application for authority to operate as a contract carrier in Nebraska intrastate commerce.

Silvey is currently authorized to operate in interstate commerce from its terminal in Council Bluffs, Iowa. Beginning in February 1985, and continuing for 2 to 3 months, Silvey began furnishing service to Packaging Corporation of America, located in Omaha. Silvey's operations consisted of leaving an empty trailer at Packaging Corporation's loading dock, returning later for the loaded trailer, and leaving another empty trailer for loading. Silvey would then take the loaded trailer to its Council Bluffs terminal overnight and deliver the load to its Nebraska destination the following day. Packaging Corporation stopped shipping with Silvey when it learned that Silvey had no intrastate authority.

On April 24, 1985, Silvey applied for intrastate authority to operate as a contract carrier. Protests were filed by Bee Line Motor Freight, Inc., and Brown Transfer Co. After a hearing on August 14, 1985, the commission entered its order denying Silvey's application.

The commission found that Silvey was fit, willing, and able to properly perform the service; that it had not shown its service was such that it would serve any distinct need of the shippers which was not already being served by common carriers; that the entry of Silvey into the field before obtaining intrastate authority was significantly detrimental to the protestants Bee Line and Brown; and that Silvey's preapplication routine of leaving truckloads overnight in Council Bluffs before delivery to their Nebraska destinations was a subterfuge to evade the Nebraska motor carriers act.

Silvey's numerous assignments of error can be consolidated into three.

Silvey contends that the finding by the commission that its operations prior to the filing of the application were a subterfuge is not supported by the evidence and was erroneous. It is Silvey's position that its business practice of picking up a loaded trailer in Omaha and taking the load to its Council Bluffs terminal, and then transporting the load to its Nebraska destination the next day, falls within its interstate authority, and therefore Silvey is not subject to the jurisdiction of the commission.

Silvey relies on the decision in *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.*, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198. In that case, the Oregon public utility commissioner sought to prevent Southwest's activities on the basis that it was involved in Oregon intrastate commerce without proper authority.

Southwest Delivery operated in interstate commerce from its terminal in Vancouver, Washington. As a part of its business, Southwest would handle shipments between Portland, Oregon (located just across the river from Vancouver), and other Oregon destinations. Appellate division 2 of the Interstate Commerce Commission held that Southwest Delivery Co.'s practice of picking up less-than-load (LTL) shipments in

Portland, Oregon, then taking them back to its Vancouver, Washington, headquarters for consolidation with other LTL shipments having prior interstate movement, and delivering the entire load to Oregon destinations, was interstate commerce and not a subterfuge.

The ICC noted that transportation of property by motor vehicle between points in the same state through another state is transportation in interstate commerce regardless of how small the distance traveled in the other state. The ICC also noted that a carrier may not use its interstate operating authority to evade legitimate state regulation of intrastate commerce. Such transportation through another state is beyond the carrier's interstate authority if done in bad faith or as a subterfuge to evade intrastate regulation.

To determine whether bad faith or subterfuge was involved, the ICC looked to the test set out in *Pennsylvania P.U.C. v. Arrow Carrier Corp.*, 113 M.C.C. 213 (1971). The test provides that the ICC and the courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's overall operation. The *Arrow* decision also stated that no single factor is controlling as to the outcome.

As to the first issue, of circuity, the ICC found circuity occurred by picking up traffic within the Portland commercial zone, moving it north to the Vancouver terminal, and then moving it southward again to Oregon destinations. However, the ICC concluded that because the Portland-to-Vancouver hauls were within the boundaries of the Portland commercial zone, any circuity was merely an ordinary and routine facet of the business of transporting LTL shipments.

> The commercial zone defines the territory which is "adjacent to, and commercially a part of" a municipality; the commercial zone exemption of 49 U. S. C. 10526(b)(1), and the territorially coextensive terminal area

> exemptions of 49 U. S. C. 10523 and implied operating authority under 49 CFR 1041.20, which allowes [sic] carriers to serve points beyond the legal boundaries of specifically authorized municipalities, all exist to enable carriers to serve, in a simple and convenient matter, industries which may be located in suburban areas. Likewise, they permit carriers to establish operating terminals in suburban areas, as they may find to be expedient and convenient.

1985 Fed. Carr. Cas. at ¶ 37,198.03.

The facts in this case are similar to those in *Southwest*. Silvey's main terminal is located just across the river from its Omaha clients, and thus could be considered to be within the Omaha commercial zone.

The second prong of the test involves operational justification for movement outside the state. The ICC in *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.*, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198, stated that it has repeatedly recognized that operations through an operating terminal are a reasonable manner of transporting LTL traffic, even when they involve moving single-state traffic through an out-of-state terminal. The opinion cites *Pennsylvania Public Utility Comm. v. Leonard Exp.*, 107 M.C.C. 451 (1968), for the "fundamental statement of the relevant legal principal [sic] that a logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and counterindicatory of subterfuge to avoid State regulation." 1985 Fed. Carr. Cas. at ¶ 37,198.03. Therefore, Southwest's consolidation at the Vancouver terminal was a reasonable, normal, and logical manner of handling LTL traffic.

In this case, the issue is whether taking truckload shipments from Omaha to Silvey's Council Bluffs terminal for purposes of storage and a change of drivers is a sufficient operational justification so as not to be a subterfuge. Even if intrastate authority is granted, Silvey will continue to use its local "shag" drivers to pick up the traffic, rather than its over-the-road drivers. It has never required its over-the-road drivers to pick up loads in a local area because that would require them to be away

from their families for a longer period of time. It uses its local shag force to be more efficient.

In addition, Silvey justifies the taking of truckloads to Council Bluffs for storage purposes. Bill O'Brien, director of traffic and transportation for the Richman Gordman stores, testified that Silvey often took a loaded trailer from the Omaha distribution center to the Council Bluffs terminal and stored the product for 4 to 6 days in the trailer. This storage need is due to congested dock space at the Richman Gordman distribution center.

The third prong of the test is whether the percentage of intrastate traffic is incidental or dominant when compared to overall operations at the same terminal.

In the *Southwest* case, 698 shipments traveled single state, while 28,403 were handled in interstate commerce during the same period. The ICC found the single-state traffic was clearly incidental to Southwest's overall operations. It also found of importance the fact that even if Southwest had to obtain intrastate authority, it would continue to operate through its Vancouver terminal. "We see no better indication of defendant's good faith in this case than the lack of any persuasive reason why it should be expected to change its manner of handling the challenged single-State traffic, even if it had intrastate authority to provide the service." 1985 Fed. Carr. Cas. at ¶ 37,198.03.

The record in this case supports a finding that Silvey's interstate traffic is far more dominant than the small amount of intrastate traffic that would be involved if the application were granted.

In *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.,* 1986 Fed. Carr. Cas. (CCH) ¶ 37,249, based on new evidence, Maudlin petitioned for administrative review of the appellate division 2 finding that Southwest was not engaged in intrastate commerce. Maudlin argued that portions of Southwest's traffic from Portland through the Vancouver terminal and back to Oregon were truckload (rather than LTL) in nature and, therefore, did not require movement to the Vancouver terminal. Southwest argued that even though the loads did not need to be

consolidated, they nevertheless needed to go to Vancouver for rating, billing, weighing of the trailers, and tightening and checking of the chains and bindings that secured the loads. The ICC held that this information did not change the outcome of the three-part test discussed in the first case.

Again citing *Pennsylvania P.U.C. v. Arrow Carrier Corp.*, 113 M.C.C. 213 (1971), it held:

> For the type of traffic routing involved in this proceeding, a carrier's conduct has been found lawful when the routing is reasonably direct and is employed: (a) to permit the efficient processing of traffic through a principal terminal; *or* (b) to permit consolidation of interstate and intrastate traffic to facilitate a complete service for a consignor.

(Emphasis supplied.) 1986 Fed. Carr. Cas. at ¶ 37,249.03.

Thus, it is clear that consolidation is not the only legitimate justification for hauling single-state loads out of state. In this case, the needs for a change of drivers and for storage are necessary for an efficient processing of traffic through a principal terminal.

Maudlin also argued that Southwest's rates for Oregon traffic were 25 to 27 percent below the prevailing Oregon intrastate rates, and, therefore, appellate division 2 was incorrect in characterizing the rates as " 'remarkably moderate' discounts." 1986 Fed. Carr. Cas. at ¶ 37,249.02. The ICC rejected this argument and held that Southwest may legitimately price its interstate service under federal ratemaking guidelines and that such action does not constitute a bad faith circumvention of State requirements.

We conclude that the record does not support the finding by the commission that Silvey's operations were a subterfuge, and conclude that the order to that extent must be reversed. This, however, does not establish that the denial of the application was erroneous.

The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be

consistent with the public interest. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972); *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968).

If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied. In *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra*, we held, "Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established." (Syllabus of the court.)

Silvey contends that the commission erred in finding that it had failed to show a distinct need for its services that was not already being met by existing common carriers. Silvey argues that it can provide needed and specialized service to Packaging Corporation due to the close proximity of both operations. Packaging Corporation requires quick response time from a carrier to pick up loaded trailers because of its restricted dock space. Silvey is located 3 minutes away from Packaging Corporation's docks. However, the record indicates that Packaging Corporation has been able to move the three to four loads a week previously handled by Silvey by utilizing other common carriers. Packaging Corporation stated that it was possible that Bee Line and Brown could perform the same services, but in a little longer time. Both protestants have truck terminals located in Omaha, and Bee Line's Omaha terminal is located within 15 minutes' response time from Packaging Corporation's docks.

Silvey also argues that it can provide a needed and specialized service in providing "pool shipments," in which shipments for different destinations are loaded onto one truck. Bill O'Brien of Richman Gordman stores testified that on interstate shipments by Silvey, the company is forced to unload Silvey's trailers in Omaha and reload shipments for other Nebraska destinations onto their private fleet, due to Silvey's lack of intrastate authority. However, the record shows that N&W Transfer, a Nebraska common carrier with both interstate and intrastate authority, has been providing its shipping services to Richman

Gordman since 1979. In addition, both Brown and Bee Line have interstate as well as intrastate authority. O'Brien testified that he had not requested the services of either company but would have no objection to using their services, if needed, and that past use of the services has been good.

Finally, Silvey points to its needed and specialized service of storing loaded trucks at its Council Bluffs terminal until Richman Gordman is ready for delivery. O'Brien testified that this is part of the specialized service that Silvey provided. The record does not show whether other carriers could or could not provide this service.

In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987); *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986).

From the record in this case, it cannot be said that the evidence does not support a finding that Silvey's services can be provided just as well by existing common carriers.

> " ' "Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it. . . ." ' "

In re Application of McCarty, 218 Neb. 637, 641, 358 N.W.2d 203, 206 (1984), quoting from *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 330 N.W.2d 123 (1983).

Silvey next assigns as error the finding that its entry into Nebraska intrastate commerce would be significantly detrimental to the operations of Bee Line and Brown. Silvey argues that Bee Line and Brown operate predominantly as LTL carriers and that Silvey is not interested in providing LTL services. But, as the appellees point out, the scope of Silvey's application is not limited to truckload authority and, if granted,

would include LTL authority. In addition, the record indicates that Bee Line's revenue derived from service to Packaging Corporation declined by one-half when Silvey began providing its services. Thus, there is evidence to support the commission's finding that entry into the field by Silvey would be detrimental to Bee Line and Brown.

Since there is evidence to support the finding of the commission that the application should be denied, that part of the order must be affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

DALE K. MOSEMAN, APPELLANT, V. L & P INVESTMENT COMPANY ET AL., APPELLEES.

414 N.W.2d 254

Filed October 23, 1987. No. 85-942.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Licensee: Negligence.** The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Robert R. Moodie of Friedman Law Offices, for appellant.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The plaintiff, Dale K. Moseman, commenced this action to recover damages for the injuries he sustained when he jumped from a window of a second-floor apartment in a building owned by the defendants. The trial court sustained the defendants' motion for summary judgment and dismissed the petition. The plaintiff has appealed.

The petition alleged that on December 23, 1980, the plaintiff was a social invitee in an apartment leased by Joyce Brooks from the defendants; that a life-threatening situation arose when the plaintiff was violently attacked by another individual; that the doors to the apartment were equipped with deadbolt locks that required the use of a key to unlock the doors of the apartment on the outside or the inside; that because the plaintiff was unable to unlock either door, he was forced to jump through a window in order to escape from his attacker; and that as a result, he was seriously injured.

The petition alleged the defendants were negligent in the following particulars:

> 1) Failing to exercise ordinary care to render the premises in a reasonably, safe condition and free from latent defects, i.e. installing and failing to replace a deadbolt lock which required the use of a key for operation from the inside, therefore, unreasonably hampering and preventing exit from the premises at a time of emergency.
>
> 2) Failing to comply with the provisions of the laws, ordinances and building codes quoted above, i.e. by installing and failing to replace a deadbolt lock which required the use of a key for operation from the inside, therefore, unreasonably hampering and preventing exit from the premises at a time of emergency.

"In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from

the evidence." *Chadd v. Midwest Franchise Corp., ante* p. 502, 505, 412 N.W.2d 453, 457 (1987); *In re Estate of Thompson,* 225 Neb. 643, 407 N.W.2d 738 (1987).

> Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

Chadd, supra at 505, 412 N.W.2d at 456.

The plaintiff's first assignment of error alleged that the trial court erred in failing to find there was a material issue of fact as to whether the defendants had failed to keep and maintain the premises in a reasonably safe condition, free from latent defects.

As a social guest in the apartment, the plaintiff had the status of a "licensee" and thus was entitled to the following:

> "The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care."

Dukes v. Barkdoll, 211 Neb. 546, 548, 319 N.W.2d 432, 434 (1982), citing *Casey v. Addison*, 190 Neb. 634, 211 N.W.2d 410 (1973).

The record shows that the plaintiff knew of the lock situation at the apartment and at one time had his own key to come and go at will from the apartment. There is no evidence of willful or wanton negligence on the part of the defendants. There is nothing to support the plaintiff's allegation of the breach of a duty owed the plaintiff by the defendants.

It is unnecessary to consider the plaintiff's other assignments of error.

The judgment is affirmed.

AFFIRMED.

ROBERT E. JOHNSON, JR., APPELLANT, V. NM FARMS BARTLETT, INC., A NEBRASKA CORPORATION, APPELLEE. WHEELER III, A NEBRASKA GENERAL PARTNERSHIP, APPELLANT, V. NM FARMS BARTLETT, INC., A NEBRASKA CORPORATION, APPELLEE.

414 N.W.2d 256

Filed October 23, 1987. Nos. 85-963, 85-964.

1. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judges: Appeal and Error.** Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
3. **Injunction.** The purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe that there will be a resumption of the violations or activities.
4. **Judgments: Final Orders: Appeal and Error.** While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
5. **Waters: Liability: Damages.** A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
6. **Waters.** The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
7. _____. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.
8. _____. Waters resulting from rainfall and melting snow are diffused waters

which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.

9. _____. The alteration of natural drainage is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.
10. **Waters: Liability: Negligence: Proof.** The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
11. **Waters: Liability: Damages: Negligence: Proof.** Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
12. **Contracts: Statute of Frauds: Proof.** In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.

Appeal from the District Court for Wheeler County: RONALD D. OLBERDING, Judge. Appeal in No. 85-963 dismissed. Judgment in No. 85-964 affirmed.

Robert H. Berkshire and Richard N. Berkshire, for appellants.

Douglas Pauley of Conway, Connolly and Pauley, P.C., for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

These two cases were consolidated for trial and for argument in this court. In the first case filed in the district court, designated as case No. 85-964 in this court, appellant, Wheeler

III, a Nebraska general partnership, sued appellee, NM Farms Bartlett, Inc., a Nebraska corporation, claiming the latter discharged diffused surface waters upon Wheeler III's land, which is located immediately to the north of a portion of NM Farms' lands, and sought damages and an injunction preventing NM Farms from so doing. Later, appellant, Robert E. Johnson, Jr., one of the three Wheeler III partners and sole owner of land immediately to the north of that owned by Wheeler III, sued NM Farms, claiming that it discharged diffused surface waters onto his land as well. He too sought damages and injunctive relief. Johnson's action is designated as case No. 85-963 in this court. In case No. 85-964, the district court permanently enjoined NM Farms from discharging water onto the Wheeler III land, but found that Wheeler III was not entitled to damages. In case No. 85-963, the district court made no ruling on Johnson's request for a permanent injunction and found he was not entitled to damages, notwithstanding the fact that, according to all the parties, Johnson and NM Farms had stipulated that no evidence would be adduced on the damages issue pending determination as to whether NM Farms was liable to Johnson. In these appeals both Wheeler III and Johnson assign as operative errors the district court's (1) failure to award damages, (2) denial of their motions in limine seeking to exclude evidence concerning their desire to have NM Farms purchase their lands, and (3) finding that Wheeler III had granted NM Farms an oral easement to run water across its land. NM Farms has not appealed the injunction entered against it in favor of Wheeler III. For the reasons hereinafter discussed, we dismiss Johnson's appeal and affirm the district court's judgment in Wheeler III's action.

In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hughes v. Enterprise Irrigation Dist., ante* p. 230, 410 N.W.2d 494 (1987); *Platte Valley Fed. Sav. & Loan Assn. v. Gray, ante* p. 135, 409 N.W.2d 617 (1987);

Neb. Rev. Stat. § 25-1925 (Reissue 1985). Further, where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, this court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof. See, *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985). Since the record in this case does not tell us what the judge saw nor what findings he made as a result of his view, we give no weight to the fact that he viewed some of the lands involved.

The lands in question are located in this state's Sandhills. In this locale, water, where no natural watercourse exists, fills the lower areas, and then proceeds to the next lower area, and travels across the land to a natural watercourse. Moreover, even when not connected to a water channel, low areas sometimes fill with water because of underground seepage.

NM Farms owns a quarter section of land which abuts the southern boundary of the quarter section owned by Wheeler III. Wheeler III's land is lower in elevation than is NM Farms' quarter section, dropping 11 feet from south to north. Johnson owns the quarter section abutting the northern boundary of Wheeler III's land and even lower in elevation, dropping an additional 4 to 5 feet from south to north.

Between 1979 and 1982, NM Farms drained and leveled its quarter section by cutting down the hills and filling in the low areas, lakes, and ponds, so as to enable it to use a center pivot irrigation system. The water displaced by these operations ran north over the Wheeler III and Johnson lands, over land owned by Joe Kneivel, under an east-west county road, and over land owned by Gerald Titterington, to Beaver Creek, which bisected the Mignery Ranch north of the Wheeler III land.

In addition to the aforesaid quarter section, NM Farms owns lands which abut the western boundaries of the Wheeler III, Johnson, and Kneivel lands. These NM Farms lands are referred to throughout the remainder of this opinion as NM Farms' western lands. The land NM Farms owns to the south of

the Wheeler III land will be referred to as NM Farms' quarter section.

Wheeler III purchased its land in 1979, leveled it, installed a well and a center pivot irrigation system, and commenced farming operations in the spring of 1980 on what had previously been pastureland.

In 1979 or 1980, NM Farms built a dam in a drainageway leading to the Wheeler III land for the purpose of keeping "the water from running further into" NM Farms' quarter section and to "impound the water or to pump up to the pivot system."

The fall of 1982 and spring of 1983 brought abnormally high amounts of precipitation to the Sandhills area. The water table was high, and water drainage problems appeared on properties which had had none before. The high water table rendered some land unfarmable and unrentable, and such land consequently sat idle.

While Wheeler III farmed its land in 1983, NM Farms did not farm its quarter section "[b]ecause the water table was too high in the low areas to the extent it was shallow lakes." Instead, the property was placed in the federal Payment-in-Kind program.

Prior to 1983, there was no natural watercourse on the Wheeler III, Johnson, or Kneivel lands. Rain and irrigation water would spread out on the Wheeler III property, collect in its pockets and valleys to form ponds, and then evaporate or become absorbed into the ground and underground channels.

At some point, NM Farms repaired its dam "where it was . . . poorly constructed," but in the spring of 1983, the dam nonetheless broke. That event caused a large amount of water to flow onto the lower northern properties. The rush of water cut a channel through the Wheeler III, Johnson, and Kneivel lands, and then turned east before again flowing north toward the Mignery Ranch and into Beaver Creek.

Sometime before mid-June of 1983, Steve Koinzan, the farm manager for Wheeler III and Johnson, and their farm operator, Rick Schindler, met with John Bryant, NM Farms' manager. They attempted to reach some joint understanding or agreement to alleviate the water problems each of them was experiencing. Bryant proposed two alternative solutions. The

first alternative was to develop a system to drain the excess surface waters from the quarter section owned by NM Farms through the Wheeler III, Johnson, Kneivel, Titterington, and Mignery Ranch lands into Beaver Creek. This would be accomplished by connecting ditches to follow the path of least resistance on these lands. The second alternative was to construct a ditch through NM Farms' western lands and then discharge the waters into the creek.

After examining a survey of the properties, prepared by NM Farms, Koinzan told Bryant he liked the first alternative and would recommend its adoption to Wheeler III and Johnson, but that he himself had no authority to sign an easement for NM Farms to discharge water onto the Wheeler III and Johnson lands. Koinzan thought that the first alternative would benefit Wheeler III because it would drain the ponds on its land. Bryant later dropped off an easement agreement at Koinzan's office, and Koinzan forwarded it on. NM Farms then obtained an easement across the Mignery Ranch for $1, and across Titterington's property for $10,000. Wheeler III and Johnson eventually rejected the easement proposed to them, but nonetheless decided to participate in the first alternative by constructing a ditch which very closely followed the survey prepared by NM Farms. In addition, Wheeler III constructed some lateral ditches to help drain the ponds on its property.

During the first part of May 1984, Wheeler III was unable "to completely plant [its land], it was too wet and there was [sic] still a few potholes and the ground next to the ditches and the generally flat low laying [sic] areas we still lost part of that from dying out." There was "an extreme large amount of water flowing down through the ditchs [sic], live water, from the south at that time and it kept the property fairly wet where you couldn't get and get around with the machinery." The ditches caused several problems. The tractor stuck several times, and the center pivots kept getting stuck in the ditches as they went through. Nonetheless, neither Wheeler III nor Johnson made any complaint to anyone at NM Farms about a water problem during the 1984 crop-year.

During July, August, and September of 1984, NM Farms pumped water, which came from a watershed south of its

quarter section, into the ditch. The water then flowed toward Beaver Creek across the Wheeler III, Johnson, Kneivel, and Titterington lands. The Titterington land was planted to hay, and Titterington asked NM Farms to stop pumping so that he could put up his hay. NM Farms stopped pumping the water, and 2 days later the water stopped running across Titterington's land, so that he could harvest his hay.

Wheeler III's 1984 popcorn crop was caught in a September frost, and, consequently, the prospective purchaser rejected the corn because of frozen and immature kernels.

In late November of 1984, Johnson contacted Bryant and indicated he would like NM Farms to purchase his and Wheeler III's lands, or enter into some sort of a long-term cash lease agreement. Bryant indicated he did not believe NM Farms would be interested, but suggested that he contact Kenneth Morrison of the Morrison Quirk Grain Corporation. In response, Johnson said he "might have to reconsider [the] drainage agreement that [he] had" with NM Farms.

After this conversation, NM Farms decided to construct a different route for its water discharges, totally outside of the Wheeler III, Johnson, and Kneivel lands. This new drainage system was started in 1984 and completed in early 1985, at a cost of $50,000. It, in effect, implemented NM Farms' second alternative solution as proposed in 1983. In constructing the new ditch NM Farms filled in a swale on the south side of the ditch to prevent water from flowing back onto NM Farms' property, but NM Farms did nothing on the north side of the ditch to prevent water from flowing from the diversion ditch onto the Wheeler III land.

In 1985 Wheeler III attempted to lease its land, but none of the 18 prospective tenants were interested. Thus, the land was not farmed at all in 1985.

In May of 1985, water backed up and overran NM Farms' new ditch, which had filled with sand. As a consequence, water again rushed north toward Titterington's property. On May 9, 1985, Titterington built a small dike on Wheeler III's land to prevent further water flow.

Wheeler III adduced testimony that in 1983 it received $13,000 from Crop Advisory pursuant to the terms of a lease

under which Crop Advisory farmed Wheeler III's land. However, Crop Advisory did not follow up on its commitment to enter into a like lease for 1984. Wheeler III then entered into a lease with Crop Advisory to share costs and profits on a half-and-half basis. As a consequence, Wheeler III suffered a loss of $5,230.91. There was testimony that the fair rental value of Wheeler III's land for 1985 was $9,945, but it does not appear that Wheeler III had obtained any commitment from anyone to lease the land for 1985. In addition, Wheeler III adduced testimony that as a result of the water damage the value of its land was diminished by an amount ranging from $39,000 to $48,000, that it spent $11,700 in 1983 to dig ditches for the purpose of alleviating its water problems, and that additional expenditures of between $5,000 and $6,000 would be required to make its lands farmable.

On the other hand, NM Farms adduced testimony that while the value of Wheeler III's land dropped from $750 per acre in 1983 to its present value of $360 per acre, that decrease was due to general economic conditions and to the general decline in farmland values. It was this witness' opinion that Wheeler III's land had not been damaged to any extent from flooding and that if there were damage, it was not permanent. It was this witness' further opinion that the addition of the drainage ditches increased the value of Wheeler III's land.

We concern ourselves first with the Johnson case, for it is not yet ripe for appeal and therefore is not properly before us. In determining that Johnson was not entitled to damages, the district court resolved a matter not before it in view of the stipulation that no evidence concerning damages would be adduced until after resolution of whether NM Farms had any liability to Johnson. If the district court meant by its decision to rule that it did not award damages because it found NM Farms had no liability to Johnson, we cannot discern that intention from the mere fact that the court denied Johnson's prayer for a permanent injunction. Since the purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe there will be a resumption of the violations or activities, *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980), such

a ruling could just as well flow from a conclusion that it was unlikely NM Farms would in the future discharge its diffused surface waters onto Wheeler III's land. In any event, as the following analysis of Wheeler III's action will demonstrate, a finding that NM Farms has no liability to Johnson would be erroneous.

While it may be appropriate under certain circumstances to bifurcate trials, this court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken. *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986); Neb. Rev. Stat. § 25-1911 (Reissue 1985). Thus, we dismiss Johnson's appeal for lack of jurisdiction.

This brings us to Wheeler III's first assignment of error, the district court's failure to award it damages.

We conclude from the evidence that Wheeler III's damages, if any, and whatever the proper elements thereof may be, arose from four sources: (1) a raised water table; (2) the leveling and draining of NM Farms' quarter section; (3) NM Farms' September 1984 water pumping; and (4) the breaking of NM Farms' dam.

The water table rose as the result of unusual amounts of precipitation, an act of nature for which NM Farms has no liability. *Baum v. County of Scotts Bluff*, 172 Neb. 225, 109 N.W.2d 295 (1961).

The analysis of NM Farms' liability for such damages, if any, as may have resulted from the leveling and draining of its quarter section rests initially upon Neb. Rev. Stat. § 31-201 (Reissue 1984), which provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

In *Jameson v. Nelson*, 211 Neb. 259, 263-64, 318 N.W.2d 259, 262-63 (1982), this court set out the legal principles arising

from applications of the foregoing statute:

> The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950). While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor. *Nichol v. Yocum, supra.* It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow *in a state of nature. Delp v. Laier*, [205 Neb. 417, 288 N.W.2d 265 (1980)].

(Emphasis in original.) See, also, *Eunice Harrington Investments, Ltd. v. Wallace*, 207 Neb. 373, 299 N.W.2d 174 (1980).

This court has also held that alteration of natural drainage is acceptable where the interests of good husbandry are served,

circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present. *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

The evidence convinces us that the alterations which NM Farms made on its quarter section served the interests of good husbandry and were necessary, but that they were not undertaken in a reasonable, nonnegligent manner under all the circumstances present, and resulted in a concentrated discharge of diffused surface waters from its quarter section onto Wheeler III's land in other than depressions, draws, swales, or drainageways through which said waters were wont to flow in the natural condition of the lands involved. The evidence further convinces us that the waters so discharged were the proximate cause of some of Wheeler III's damages.

The waters pumped from NM Farms' western lands into the ditch are characterized by Wheeler III as diffused surface waters. Since the record does not contradict that characterization, the foregoing analysis relating to NM Farms' liability for leveling and draining its quarter section applies as well to this third source of excess water discharged upon Wheeler III's land.

This brings us to the fourth and last source, the waters discharged by the breakage of the dam. *Barnum v. Handschiegel*, 103 Neb. 594, 173 N.W. 593 (1919), presented a suit for damages suffered when a dam defendant had built across a natural stream broke. The structure had been erected " 'as an ice and fish reservoir and for irrigation' " and other uses. *Id.* at 595, 173 N.W. at 593. Rev. Stat. § 3444 (1913) then provided, as does present Neb. Rev. Stat. § 46-241 (Cum. Supp. 1986), that the owner of a "storage reservoir" shall be liable for damages resulting from, among other things, "the breaking of the embankment of such reservoir." Section 3444 further provided, as does present Neb. Rev. Stat. § 46-243 (Reissue 1984), that a "reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level . . . shall not be considered a storage reservoir . . . ." The *Barnum* court concluded that in view of the statutory language exempting a structure which held water for irrigation from the definition of "storage reservoir," the owner

of a nonstorage reservoir was liable, in the event of breakage, only if he or she had negligently constructed or maintained the structure. The *Barnum* court also held that in such a case the "burden of proof is upon the plaintiff; but, when he has established the breaking of a dam and resulting injury, he has made a *prima facie* case. The defendant must then show that the dam was not negligently constructed or maintained." *Id.* at 598, 173 N.W. at 594. Although the case before us does not involve the damming of a natural stream, we nonetheless deem the situation at hand to be analogous to that presented in *Barnum*, and we therefore apply to the present case the rules announced by the *Barnum* court.

We conclude from the evidence that NM Farms built its dam, at least in part, to hold water for irrigation and that under the circumstances its dam does not constitute a storage reservoir. However, we also determine that NM Farms failed to show its dam was not negligently constructed or maintained and that it is therefore liable for the damages Wheeler III sustained as a consequence of the breakage of the dam.

Nonetheless, notwithstanding the fact that NM Farms impermissibly discharged certain waters onto Wheeler III's quarter section, the district court's judgment is correct. This is so because where water from another source has been added to water from a source for which a defendant is liable, and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable. *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1, 305 N.W.2d 888 (1981); *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951); *Seibold v. Whipple*, 143 Neb. 167, 9 N.W.2d 154 (1943). See, also, *Shadow Isle, Inc. v. Granada Feeding Co.*, *ante* p. 325, 411 N.W.2d 331 (1987).

Since NM Farms is not liable for all of Wheeler III's damages, some of those damages having resulted from unusual amounts of precipitation, the failure to apportion the damages attributable to the impermissibly discharged waters precludes Wheeler III from recovering any of its damages.

The foregoing determination renders the remaining two assignments of error immaterial insofar as this case is concerned. However, as one of the remaining assignments becomes moot by resolution of the other, and that other assignment may bear on the resolution of Johnson's cause, we proceed to a consideration thereof.

We note the finding Johnson attributes to the district court, that "Wheeler III orally granted NM Farms an easement to run water onto and across Wheeler III property," does not appear in the record. Nonetheless, such a finding, if it exists, is not warranted by the evidence.

Neb. Rev. Stat. § 36-103 (Reissue 1984) provides:

> No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

Neb. Rev. Stat. § 36-106 (Reissue 1984) provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

In order to establish that an oral contract falls within the § 36-106 exception to the statute of frauds found in § 36-103, the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.

Even if the other requirements were met, questions with which we do not concern ourselves, we are not clearly, satisfactorily, and unequivocally convinced that the acts performed by NM Farms were solely referable to any oral agreement there may have been with Johnson. That determination renders unnecessary any consideration as to whether the district court should have admitted testimony of

Johnson's need to reconsider his agreement with NM Farms.

APPEAL IN NO. 85-963 DISMISSED.
JUDGMENT IN NO. 85-964 AFFIRMED.

IN RE ESTATE OF LOUIE H. VILLWOK, DECEASED.
JANET ANDERSON ET AL., APPELLANTS, V. ROSE M. VILLWOK, APPELLEE.
413 N.W.2d 921

Filed October 23, 1987. No. 85-988.

1. **Wills: Pleadings.** Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
2. **Wills: Words and Phrases.** One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
3. **Wills.** Testamentary capacity is tested by the state of a testator's mind at the time the will is executed.
4. **Wills: Undue Influence: Proof.** The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
5. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and where the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

George E. Brugh, for appellants.

David T. Schroeder, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Janet Anderson, Elaine Jane Wesely, and Marilyn Smith, who are objectors to the probate of the will of Louie H. Villwok, appeal from an order of the district court for Saunders County, sustaining a motion for summary judgment filed by appellee, Rose M. Villwok, proponent of the will, dismissing appellants' objections to probate of the will, and remanding the action to the county court for further probate proceedings. We reverse the order and remand the cause to the district court for further proceedings.

The record before us shows the following. Louie Villwok, age 64, died on November 12, 1984, while a resident of Cedar Bluffs, Nebraska. He left surviving him his wife, Rose Villwok, and the appellants, who are three daughters from a previous marriage between decedent and Elaine Villwok. That marriage ended in divorce in 1973. Rose Villwok's previous marriage ended in divorce in 1972. The decedent and the appellee were married on March 5, 1974. On November 17, 1977, decedent executed a will which provided that Rose Villwok would receive the entire estate in the event that she survived decedent. Had Rose Villwok predeceased decedent, the will provided that each of the testator's daughters from his previous marriage and each of the daughters of Rose Villwok from her previous marriage would receive a general bequest of money and a portion of the residue.

On November 28, 1984, in the county court for Saunders County, appellee filed an "Application for Informal Probate of Will and Informal Appointment of Personal Representative" of Louie Villwok's will. On December 24, 1984, appellants filed an objection to the probate of the will. On February 19, 1985, appellee filed a "Formal Petition for Complete Settlement after Informal Testate Proceeding." An inventory filed by the personal representative, Rose Villwok, indicates a total estate in the amount of $430,985. On April 1, 1985, appellants filed an objection to probate of the will and a "Notice of Transfer" of the matter to the district court pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 1985). Appellants alleged that the will was not a valid will of the decedent for the following reasons: (1) that the will was not subscribed and attested in accordance

with Nebraska law; (2) that decedent lacked testamentary capacity at the time of the making of the will; and (3) that the will was a result of undue influence of Rose Villwok.

Appellee filed a motion for summary judgment. At the hearing on the motion for summary judgment, Rose Villwok offered eight exhibits, all of which were received into evidence without objection. Included were the deposition of appellee, the depositions of each appellant, and the affidavit of Marie Kobza, who witnessed decedent's signature to the will. Appellants offered in evidence an affidavit of Ernest Villwok and the affidavits of each of the three appellants. The trial court sustained objections to these four affidavits.

Appellants allege two assignments of error: (1) The district court erred in sustaining the appellee's objections to appellants' offer of the four affidavits, and (2) the court erred in granting the appellee's motion for summary judgment. We turn first to the four excluded affidavits.

In the affidavit of Ernest Villwok, brother of decedent, the affiant states that he "was very well acquainted with my brother and was familiar with his handwriting and signature" and that "it is my opinion that the purported signature of Louie H. Villwok is not that of my brother and that the signature shown on said document [the will] does not appear to be my brother's handwriting." If properly admitted into evidence, this affidavit would raise an issue of fact as to the validity of decedent's signature.

Appellee alleges that appellants have not raised as an issue the validity of the signature appearing on the will. This is not correct. In their objections, the appellants alleged that "the Will was not subscribed and attested in accordance with Nebraska law." This court held in *In re Estate of Renter*, 148 Neb. 776, 779, 29 N.W.2d 466, 468 (1947):

> Clearly, the act of signing is one of the elements constituting the execution of a will. When contestants presented the objection that the will was not executed in manner and form as required by law, they presented an objection which included the question of whether the signature on the instrument was that of the alleged testator.

Thus, by alleging that the will was not "subscribed and attested in accordance with Nebraska law," appellants' pleadings were sufficient to raise the issue of the signature's validity.

Once raised, sufficient evidence must be offered to create a question of fact as to that issue. Ernest Villwok's affidavit provides sufficient evidence to raise a question of fact as to the validity of the signature. We hold that the district court erred in sustaining appellee's objection to this affidavit.

In connection with summary judgments, Neb. Rev. Stat. § 25-1334 (Reissue 1985) requires that "[s]upporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ernest Villwok, because of his stated familiarity with decedent's signature, may testify as to the validity of that signature. Neb. Rev. Stat. § 27-701 (Reissue 1985) provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Clearly, the affidavit of Ernest Villwok was based on his perception and would be helpful to determination of a fact in issue. His affidavit should have been received in evidence. When received, the affidavit raises a question of fact, and summary judgment is then not appropriate.

The district court was correct in excluding the three affidavits of appellants. Construing § 25-1334, this court stated that " ' "[u]nder this provision [Fed. R. Civ. P. 56(e)], therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in evidence * * *." ' " *Hanzlik v. Paustian*, 216 Neb. 575, 579-80, 344 N.W.2d 649, 652 (1984), citing *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957). The *Eden* court, quoting *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943), stated at 328, 85 N.W.2d at 646: " 'Hence we

have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. . . .' " Exclusion of those affidavits, however, does not determine the appeal, because the same allegations, in more detail, were set out in the deposition of each affiant. Those depositions were received in evidence at the summary judgment hearing.

In support of the second assignment of error appellants have alleged that decedent lacked testamentary capacity and that the will was the result of undue influence of Rose Villwok on the decedent.

Appellants first contend that as a result of decedent's frequent drinking and resulting intoxication, he lacked the requisite testamentary capacity to make his will. The record, however, reveals no evidence that decedent was intoxicated on the day and at the time the will was executed.

One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981); *Anderson v. Claussen*, 196 Neb. 787, 246 N.W.2d 586 (1976). Such capacity is tested by the state of a testator's mind at the time the will is executed. *In re Estate of Schoch, supra.*

With regard to the undue influence allegation, the record provides sufficient evidence to create a question of fact. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence. *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986).

The question is not answered by the statement in appellee's brief at 13, "The burden of proof with respect to the issue of undue influence is on the Objectors or Contestants." That statement is correct, but is not dispositive on a motion for summary judgment, as in this case. On the summary judgment question, the initial question to be decided is whether there is an

issue of fact, and the court need not determine, at that time, the weight to be given to conflicting evidence.

This court has stated many times that undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inference from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity afforded designing persons for the exercise of improper control. *In re Estate of Price, supra.* See *Andersen v. Andersen*, 177 Neb. 374, 128 N.W.2d 843 (1964). Furthermore, in a trial, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from such established facts. The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence. *Cook v. Ketchmark*, 174 Neb. 222, 117 N.W.2d 375 (1962); *In re Estate of Bowman*, 143 Neb. 440, 9 N.W.2d 801 (1943). In this case circumstantial evidence exists on this issue, as set out in the depositions of the three appellants.

Due to the surreptitious nature of undue influence, evidence in support of such an allegation usually is circumstantial in nature. Such evidence shows a course of conduct over a period of time intended to influence the mind of the testator. The influence must, of course, be "undue." Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Price, supra.*

Appellants allege that Rose Villwok engaged, over a period of time, in exerting such influence. On consideration of a motion for summary judgment, the court does not determine that there was undue influence, but only determines that there was evidence sufficient to create a factual question as to its potential existence.

The depositions of appellants, received in evidence without objection, reveal sufficient evidence to raise a factual question as to the existence of undue influence. The deposition of Rose Villwok reveals that she and decedent had worked in decedent's restaurant since 1968. After she married decedent in 1974, the

relationship between her and decedent's children deteriorated. Rose Villwok testified that she was always present when decedent's children visited. With regard to decedent's assets, testimony shows that all major holdings, including the house, restaurant, stock, savings accounts, and a farm inherited by decedent, were owned by decedent prior to his marriage to Rose Villwok.

The deposition of each appellant daughter reveals that decedent drank heavily on a daily basis and was intoxicated much of the time. While Rose Villwok was at work, decedent visited his daughter Elaine Jane Wesely at her home. In addition, Elaine would visit him at a bar or at his home when Rose was not there. Decedent also visited his daughter Janet Anderson and was careful to arrive home before Rose Villwok returned from work. All three daughters indicated that Rose Villwok made a concerted effort both to be present when the daughters would visit and to keep them apart from their father by being inhospitable during visits and by regularly refusing dinner invitations from the daughters.

Each daughter also testified as to decedent's statements regarding disposition of his property. Elaine Jane Wesely stated that her father indicated to her that he did not want Rose or her children to have his property. Similarly, Janet Anderson testified that her father said, "I don't want Rose or her children to have anything." Marilyn Smith testified that the testator stated to her that " 'I should not be telling you this, but you girls get all the property, the steak house and all the money that was in the CDs and everything' . . . 'Rosie gets nothing except the house'. . . ."

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and where the moving party is entitled to judgment as a matter of law. *In re Estate of Thompson*, 225 Neb. 643, 407 N.W.2d 738 (1987), citing *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987). In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party

against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *In re Estate of Thompson, supra*, citing *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987). We hold that in this case factual questions exist as to undue influence and the validity of testator's signature. Summary judgment is therefore improper. We reverse the summary judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROGER L. LIBERTY, APPELLEE, V. LUANN M. LIBERTY, APPELLANT.
413 N.W.2d 926

Filed October 23, 1987. No. 86-613.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

L.J. Sass, for appellant.

Steven R. Brott, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Plaintiff-appellee, Roger L. Liberty, filed his petition to dissolve the common-law marriage of the parties. The marriage was based on the fact that the parties had lived in Kansas for some time during the time they lived together from 1974 to July 26, 1985, the time of the filing of the petition. Respondent-appellant, Luann M. Liberty, also prayed for a dissolution. The trial court dissolved the marriage and granted physical custody of the parties' four minor children to plaintiff, while retaining legal custody in the court. Respondent has appealed, assigning as error the custody order.

We have reviewed the record de novo and find no abuse of the trial court's discretion in this custody order. We have held that child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, the judgment of the trial court will be affirmed in the absence of an abuse of that discretion. *Ainsworth v. Ainsworth*, 224 Neb. 160, 396 N.W.2d 285 (1986). The judgment of the trial court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE INTEREST OF J.K.B. AND C.R.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.R.B., APPELLANT.

414 N.W.2d 266

Filed October 23, 1987. No. 86-981.

1. **Parental Rights: Trial: Due Process.** A proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
2. **Parental Rights: Trial: Rules of Evidence: Judicial Notice.** At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
3. **Parental Rights: Trial: Rules of Evidence.** In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
4. **Appeal and Error.** Error without prejudice forms no basis for appellate relief.
5. **Parental Rights: Appeal and Error.** Proceedings to terminate parental rights are reviewed by the Nebraska Supreme Court de novo on the record.
6. **Appeal and Error.** On a review of a record de novo, the Nebraska Supreme Court ignores improperly admitted evidence.
7. **Parental Rights: Right to Counsel.** In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
8. **Parental Rights.** Where there is a need for a rehabilitation plan, a parent has not substantially complied with a reasonable court-ordered rehabilitation plan, the

prognosis for rehabilitation is poor, and it is in the child's best interests that the parent's rights be terminated, such rights are to be terminated.

Appeal from the County Court for Clay County: JACK R. OTT, Judge. Affirmed.

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellant.

Ted S. Griess, Clay County Attorney, and Jay J. Sullivan, guardian ad litem, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Forty-one-year-old D.R.B. appeals from the judgment of the Clay County Court (sitting as a juvenile court) terminating his parental rights in and to his 9-year-old daughter, C.R.B., and 8-year-old son, J.K.B. The parental rights of the children's mother were also terminated, but she has not appealed. We are thus concerned only with the rights of the father, who argues the county court erred by (1) improperly receiving certain evidence, (2) failing to appoint counsel, and (3) concluding that the evidence clearly and convincingly establishes grounds for terminating his parental rights. We affirm.

This matter has been pending since July 13, 1982, when petitions were filed alleging the children were within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), and thus within the jurisdiction of the juvenile court. Specifically, the petitions alleged that the parents neglected or refused to provide for the children's "proper or necessary subsistence, or other care necessary for the health, morals, or well-being." Section 43-247 then provided, as it does presently, that the juvenile court have

> exclusive original jurisdiction as to . . . (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence,

> education, or other care necessary for the health, morals, or well-being of such juvenile . . . .

The family had been called to the State's attention 2 days earlier, when it was alleged the father had broken the arm of one of the mother's other children. Although the father now denies having broken the child's arm, he nonetheless pled guilty to the criminal charge arising from the incident. Nearly 4 years later, the State filed a motion to terminate the father's parental rights, alleging that "reasonable efforts under the direction of the Court have failed to correct the conditions" leading to the determination that the children were within the purview of § 43-247(3)(a).

Neb. Rev. Stat. § 43-292 (Reissue 1984) provided at the relevant time, as it does now:

> The court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . .
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

In connection with his first assignment of error, the father asserts the county court improperly admitted "into evidence in a termination proceeding all documents placed in the court file for adjudication, disposition and review proceedings."

The documents in question consist of a variety of reports from therapists, social workers, and sundry functionaries. The father objected on the ground, among others, that the reports constituted inadmissible hearsay. Since the reports would have no relevance were they offered for any purpose other than to prove the truth of the matters asserted in them, the reports were indeed hearsay. Neb. Rev. Stat. § 27-801 (Reissue 1985); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). The record tells us that the father, through counsel, stipulated at one review hearing that certain reports could be admitted if the allegations against him were changed to allege neglect rather than abuse.

Leaving aside that, so far as we can tell, neglect is all that was ever alleged, the state of the record is such that we cannot determine with certainty what records the stipulation encompassed. Further, there is no verbatim record as to the circumstances under which the myriad other reports were received in the various hearings which preceded the termination proceeding; thus, we cannot determine whether the father had an opportunity to cross-examine the authors of the reports at the time they were received in evidence. While the rules of evidence do not apply at a dispositional hearing, Neb. Rev. Stat. § 43-283 (Reissue 1984), a proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), at which parents are entitled to cross-examine adverse witnesses, *In re Interest of R.A., ante* p. 160, 410 N.W.2d 110 (1987).

While a court must take judicial notice of its own records in the case under consideration, and has the right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined, *In re Interest of R.A., supra*, and *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979), a juvenile court may not, at a proceeding to terminate parental rights, take judicial notice of facts or opinions other than as provided in the rules of evidence. *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975), an action to modify the custody provisions of a divorce decree, holds that due process requires that witnesses be subject to cross-examination. The *Jorgensen* court observed that ex parte statements are too unreliable to be considered in the investigation of controverted facts, and ruled that where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to the parties and permit them to call the person making the report to testify. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981), found letters written to the court by various welfare agencies and received in evidence without objection nonetheless failed to clearly and convincingly establish the need to

terminate parental rights. In the course of its opinion the *D.* court observed that the termination of parental rights is far too important a matter to be done by informal procedures, and encouraged the use of more formal court procedures. Something more than encouragement being needed, we now hold that in proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985), which excludes from the hearsay rule:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, there is merit in the father's first assignment of error; however, merely determining that there was error in this regard does not, in and of itself, entitle the father to relief on his appeal, for error without prejudice forms no basis for appellate relief. See, *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986); *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984). We review proceedings to terminate parental rights de novo on the record and ignore improperly admitted evidence. *In re Interest of R.A., supra.* Thus, whether the error was prejudicial depends upon whether there is evidence separate and apart from the improperly admitted reports which clearly and convincingly establishes grounds for termination of the

father's parental rights. This is a matter resolved later in this opinion by the analysis of the third and last assignment of error.

In the second assignment of error the father complains of the fact that after he discharged his appointed attorney, the court refused to appoint another.

The relevant sequence of events is that in November of 1985 the father, notwithstanding the court's warnings that these proceedings presented serious matters and that if present counsel were permitted to withdraw another might not be appointed, insisted that his appointed attorney was inadequate and wished to proceed without him. Appointed counsel was then permitted to withdraw. When the termination hearing began on July 29, 1986, the father, who had apparently been unsuccessful in his effort to retain private counsel, moved for the appointment of counsel because he was indigent. The court refused the request. Nonetheless, the previously appointed counsel appeared for and represented the father, without objection, throughout the termination hearing.

Neb. Rev. Stat. § 43-279.01 (Cum. Supp. 1986), which became effective September 6, 1985, requires that when the State alleges that a juvenile is within the purview of § 43-247(3)(a), or when termination of parental rights is sought under certain circumstances, including pursuant to the provisions of the juvenile code, and the parents appear without counsel, the court shall inform them of the right to counsel "of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer." This does not mean, however, that an indigent parent has the right to be represented by counsel of his or her own choosing or that the mere distrust of, or dissatisfaction with, appointed counsel is enough to secure the appointment of substitute counsel. Even a criminal defendant does not enjoy such rights. *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987).

Moreover, the record in this case shows the father was represented in an effective fashion during the termination proceedings by volunteer counsel who had represented him by appointment in the past and was familiar with the case. There is no merit to this assignment of error.

Lastly, the father urges, in connection with the third

assignment of error, that the evidence fails to clearly and convincingly establish, as the county court found, that reasonable efforts under the court's direction failed to correct the conditions leading the court to assert its jurisdiction in the first instance.

The properly admissible evidence establishes that the county court's various rehabilitation plans required that, among other things, the father maintain employment and suitable housing, attend parenting classes, and participate in a homemaking program.

The properly admitted evidence clearly and convincingly establishes that the father maintained only sporadic employment, failed to regularly attend various parent counseling sessions, refused to follow homemaking directions or other directions with which he disagreed, would not prepare monthly budgets, and maintained unstable living arrangements which were inadequate to receive the children (at one point he lived in his truck for a 3-day period).

Moreover, the admissible evidence shows the father, himself the product of an alcoholic and violent home, has a long history of alcohol abuse and of abusing his female companions and wives (he has had four marriages). He is in arrears on the child support he is obligated to pay for his other four children and has paid only minimal support for the children who are the subject of this action. He has an antisocial personality, dresses in female clothing in public, is hostile, and from time to time has threatened the social workers assigned to the case. Even the psychologist called as a witness on the father's behalf testified that the father's inability to control his temper when frustrated presented a threat of harm to the children. The admissible evidence further clearly and convincingly establishes that the children demonstrated negative behavior after visits with their father. Notwithstanding these problems, the father does not recognize he needs help.

We conclude from our review, having given weight to the fact that the county judge observed the witnesses and judged their credibility, that the evidence clearly and convincingly establishes that the rehabilitation plan ordered by the county court was a reasonable one, that the father has not substantially

complied with it, that the prognosis for rehabilitation is poor, and that it is in the children's best interests that the father's parental rights be terminated without further delay. Thus, grounds for terminating the father's parental rights exist under the provisions of § 43-292(6), as found by the county court. *In re Interest of T.C., ante* p. 116, 409 N.W.2d 607 (1986); *In re Interest of L.H.*, 225 Neb. 706, 407 N.W.2d 784 (1987).

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court but disagree with the statement that a juvenile court at a proceeding to terminate parental rights may not take judicial notice of facts or opinions other than as provided in the rules of evidence.

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), was concerned with the standard of proof required in termination proceedings and the necessity that the proceedings satisfy the requirements of fundamental fairness.

The U.S. Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), stated:

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

See, also, *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978).

In *Santosky v. Kramer, supra*, the Court held that in a proceeding to terminate parental rights, the process due is determined by the balancing of three factors: the private interests affected by the proceeding; the risk of error created by the state's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. In balancing these interests, I believe that due process is satisfied by use of a standard less drastic than requiring the application of the rules of evidence to materials that the juvenile court may judicially notice. The juvenile court should be able to take judicial notice of reports and other

materials received at earlier hearings and relevant in reaching a decision as to the proper disposition of the case, provided that the author of such reports or materials is available and can be subpoenaed as a witness and made available for examination by either party or the court. This procedure should be sufficient to satisfy all constitutional confrontation and due process of law requirements, provided that the reports or materials are available to the interested parties sufficiently in advance of the termination hearing so as to allow the parties to compel the attendance of the persons who wrote or prepared the materials. See *People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982).

Similarly, the court in *Matter of J.R.B.*, 715 P.2d 1170 (Alaska 1986), found that while *Santosky* held that a termination of parental rights interferes with a fundamental liberty interest of the parent, "the discretionary use of hearsay in the dispositive phase of such proceedings, subject to review for abuse of discretion, is consistent with fundamental fairness." 715 P.2d at 1174. (Citing *Stein v. New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) "(hearsay evidence rule, with all its subtleties, anomalies, and ramifications, will not be read into the fourteenth amendment)." 715 P.2d at 1174.)

A termination of parental rights hearing is the culmination of months and sometimes years of juvenile court involvement with the parties. To restrict the court's access to its own records and materials of the prior proceedings is to require the court to rehear the evidence received at those prior hearings again. This, I believe, goes too far.

Within the guidelines of notice and opportunity for cross-examination that have been set forth above, the taking of judicial notice by the juvenile court of prior reports and materials should satisfy the fundamental fairness requirements of *Santosky*.

DENNIS GRAFF AND VELDA GRAFF, HUSBAND AND WIFE, APPELLEES, V. GARY D. BURNETT, APPELLANT.

414 N.W.2d 271

Filed October 23, 1987. No. 86-1037.

1. **Liens: Livestock: Foreclosure: Equity.** An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
2. **Liens: Livestock.** When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
3. **Debtors and Creditors: Tender: Proof.** One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
4. **Debtors and Creditors: Tender: Words and Phrases.** A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
5. _____: _____: _____. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
6. **Debtors and Creditors: Tender.** Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

James L. Germer of Germer, Murray, Johnson & Germer, for appellant.

Daniel L. Werner of McKernan & Werner, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Dennis and Velda Graff commenced an action against Gary D. Burnett in the district court for Thayer County, seeking to foreclose an agister's lien, Neb. Rev. Stat. § 54-201 (Reissue 1984), and a stallion service lien, Neb. Rev. Stat. §§ 54-202 et seq. (Reissue 1984), occasioned by their oral agreements with

Burnett concerning his horses. Responding to Graffs' petition, Burnett filed an answer and then counterclaimed, alleging that Graffs wrongfully detained Burnett's horses after Burnett had tendered payment of the stud fee and feed bill for his mares. The district court awarded monetary judgments to Graffs and authorized foreclosure of the liens on the horses if Burnett defaulted in payment of the amounts awarded to Graffs. The district court found against Burnett on his counterclaim. We affirm.

Dennis and Velda Graff own a horse-breeding farm and also sell horses. In the past, Gary Burnett, as an owner and dealer of horses, has had his mares serviced by stallions at Graffs' farm. During a conversation with Dennis Graff, Burnett expressed an interest in purchasing one of Graffs' mares, She's Rocky One, which Burnett offered to purchase on condition that Graffs breed She's Rocky One to one of their stallions, Skip A Hi, and keep She's Rocky One in a stall and on grain during her stay at Graffs' farm. Graffs agreed to a sale price of $2,250 for She's Rocky One and a stud fee of $500 for Skip A Hi. Also, Dennis Graff and Burnett discussed breeding two of Burnett's mares, Miss Tuff Cutter (also known as Tuffernhel) and Roan Spanish Miss, to Skip A Hi.

On July 6, 1984, Burnett brought his two mares, with a colt at the side of each, to Graffs' farm for breeding purposes. At that time Burnett and Dennis Graff orally agreed that Burnett's mares, Miss Tuff Cutter and Roan Spanish Miss, would be bred to Skip A Hi at a stud fee of $500 for each mare.

Pursuant to their oral agreements with Burnett, Graffs bred the three mares to their stallion. In mid-September 1984, Graffs notified Burnett that a veterinarian had verified the pregnancy of the mares. Burnett arrived at Graffs' place on October 16 to pick up his horses and, with Graffs, discussed payment for the services rendered at Graffs' farm. During that conversation, Graffs presented Burnett with the following itemized statement of charges for the horses:

She's Rocky One	For purchase	$2,250
	For care	118
	For stud services	500

Miss Tuff Cutter (Tuffernhel)	For care	187
	For stud services	500
Roan Spanish Miss	For care	187
	Total	$3,742.

Burnett took out his checkbook and declared that he wanted to pay part of the bill, namely, the stud fee for Miss Tuff Cutter and the charges for feed and care for the two mares (Miss Tuff Cutter and Roan Spanish Miss). However, Burnett declined to pay any of his account regarding She's Rocky One. Therefore, Burnett was prepared to write his check for $687, pick up his two mares (Miss Tuff Cutter and Roan Spanish Miss), and leave She's Rocky One at Graffs' farm until a future payment for the purchased mare. Graffs demanded payment of the entire account, and, when the parties failed to reach a settlement of the account for the horses, Burnett left and never paid any part of the bill submitted by Graffs.

On November 8, 1984, Graffs filed a "Notice of Lien" for services of a stallion and an "Affidavit for Agister's Lien" in the office of the Thayer County clerk, which documents pertained to the care, feed, and stud services provided to the mares Miss Tuff Cutter and Roan Spanish Miss, their accompanying colts, and She's Rocky One.

Section 54-201(2), pertaining to an agister's lien, provides in pertinent part:

> When any person . . . whose residence or principal place of business is located outside the State of Nebraska shall procure, contract with, or hire any other person . . . within the State of Nebraska to feed and take care of any kind of livestock, the person so procured, contracted with, or hired shall have a first, paramount, and prior lien upon such property for the feed and care bestowed by him or her upon the same for the contract price agreed upon, and in case no price has been agreed upon, then for the reasonable value of such feed and care. . . . Prior to removal of such livestock from his or her premises, the person . . . entitled to a lien shall file in the office of the county clerk, in the county in which such livestock may be fed and kept, an affidavit describing the livestock and

setting forth the amount justly due for the feeding and keeping of the same.

Section 54-202 specifies a party's rights to be paid for stud service by that party's stallion: "Every owner, lessee, agent or manager of any stallion . . . shall have a lien upon any mare and her colt . . . served by such stallion . . . for the full amount of the reasonable or agreed value or price of such service."

In their petition, Graffs asserted two causes of action—count I relating to the stud fee (Miss Tuff Cutter) and care for the two mares (Miss Tuff Cutter and Roan Spanish Miss) and count II relating to She's Rocky One (purchase price, stud fee, and care). Burnett, in his counterclaim, alleged that Graffs wrongfully retained possession of the horses Miss Tuff Cutter and Roan Spanish Miss.

Graffs admitted that Burnett had offered to pay $687 on October 16 as part payment of the bill submitted. Graffs' evidence regarding reasonable charges, which was undisputed, showed feed and care for the mares Miss Tuff Cutter and Roan Spanish Miss—pasture at $1.50 per day for 79 days and grain feeding at $3 per day for 23 days, all of which included care and feed until October 17, 1984, when the daily rate charged for care of all horses became $15 per day. Dennis Graff then testified concerning the oral agreements and events involving Burnett and the Graffs, as previously reflected in this opinion. Dennis Graff further testified that Burnett had never remonstrated regarding the purchase of She's Rocky One and that all previous transactions with Burnett, before those in question, had been on a cash basis, a medium of payment prevalent in the horse-breeding business. As developed during Dennis Graff's testimony, on account of a prior transaction, there was a credit for Burnett, thereby resulting in the sum of $687 due for the mares which Burnett had brought to Graffs' farm.

Burnett testified that he was willing to pay the stud fee and other charges for Miss Tuff Cutter and Roan Spanish Miss, but admitted that he could not pay the purchase price for She's Rocky One. Concerning the conversation at presentation of Graffs' statement or bill, Burnett further testified that he was unwilling to write an insufficient-fund check for the entire

amount of his account, or, as explained by Burnett: "I said I could give you [Graffs] a hot check and run home and stop payment and then you're going to have to come down and get this mare or you're going to have to give me some time to make it right." Burnett also testified that Graffs would not allow removal of his bred mares and their colts unless Burnett paid for the entire bill, including the purchase price for She's Rocky One. In further testimony, Burnett stated that he had paid Graffs by check in the past, and the parties intended payment by check regarding the particular transactions involved in this case, as evidenced in a conversation with Velda Graff, who informed Burnett that the mares had been bred and Graffs "would like for you to send us a check." Burnett emphasized his willingness to pay $687 by his check payable to Graffs.

The district court awarded Graffs judgment for $687 on count I and $2,868 on count II, for an aggregate judgment in the amount of $3,555 with prejudgment interest from October 17, 1984, and a daily fee of $15 for care and feed of Burnett's horses after October 17. The judgment also authorized foreclosure of Graffs' liens on Burnett's default in payment of the amounts awarded in the judgments. Also, the district court found against Burnett on his counterclaim.

In his appeal, Burnett does not question the district court's judgment concerning count II or foreclosure of a possessory lien under § 54-201 and the lien prescribed by § 54-202. Consequently, we review no aspect of the judgment rendered on count II or the method of foreclosing the stallion service lien in the present case. However, Burnett contends that the trial court erred in (1) determining that Burnett had failed to tender payment to the Graffs, (2) awarding the Graffs excessive damages and prejudgment interest, and (3) denying relief on Burnett's counterclaim.

An action for determination of the amount of a lien, pursuant to § 54-201 or § 54-202, and foreclosure of such lien is an equity action. See *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973).

> In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court,

> provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1985)....

Hughes v. Enterprise Irrigation Dist., ante p. 230, 234, 410 N.W.2d 494, 497 (1987).

When the owner of livestock contracts with another to feed and care for the owner's livestock, § 54-201 provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care. See, *Kroll v. Ernst*, 34 Neb. 482, 51 N.W. 1032 (1892); *Gates v. Parrott*, 31 Neb. 581, 48 N.W. 387 (1891). Burnett does not question a disposition of the stallion service lien, authorized by § 54-202, as a possessory lien similar to the agister's lien under § 54-201. The undisputed evidence establishes that Graffs provided feed, care, and stud services to Burnett's mares. Graffs notified Burnett that the mares were pregnant, as verified by a veterinarian. Under the circumstances and theories advanced by the parties, Graffs were entitled to the benefit of a lien for feed and care, see, *Stickell v. Haggerty*, 158 Neb. 34, 62 N.W.2d 107 (1954), *Kroll v. Ernst, supra*, and *Gates v. Parrott, supra*, and to the benefit of a lien for the services by their stallion, Skip A Hi. See § 54-202.

The evidence presents a conflict concerning the method of payment contemplated by the parties. On the one hand, Graffs' evidence supports a finding that cash was the only acceptable form of payment, while Burnett's evidence supports a finding that the parties contemplated Burnett's check as an acceptable payment. We conclude, as a factual determination, that Graffs and Burnett intended that payment might be made by Burnett's check. Recognizing that Graffs otherwise properly perfected their liens, we must next determine whether Burnett's offer to pay by check for the mare care and stud services which were the subject of count I is a tender of payment which discharged or extinguished the liens asserted by Graffs and, consequently,

eliminated foreclosure as a remedy available to Graffs.

One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender. Cf. *Hanson v. Duffy*, 106 Ill. App. 3d 727, 435 N.E.2d 1373 (1982).

To determine whether a proper tender of payment has been made, we have stated that a tender is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made. See, *Mr. U Inc. v. Mobil Oil Corp.*, 197 Neb, 612, 249 N.W.2d 909 (1977); *Caha v. Nelson*, 195 Neb. 333, 237 N.W.2d 870 (1976). In *Mr. U Inc., supra*, we further concluded that a tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor. See, also, *Anson v. Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962) (a sufficient tender requires a present and immediate ability to make the tender good). Similarly,

> "[a] mere offer to pay does not constitute a valid tender, the law requires that the tenderer have the money present and ready, and produce and actually offer it to the other party. Tender implies the physical act of offering the money or thing to be tendered, but this cannot rest in implication alone. The law requires an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of the money and intention to produce it, is unaccompanied by any visible manifestation of intention to make the offer good."

Owens v. Idaho First Nat. Bank, 103 Idaho 465, 466-67, 649 P.2d 1221, 1222-23 (1982) (citing 74 Am. Jur. 2d *Tender* § 7 (1974)). Accordingly, although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract. See *United States v. Allen*, 699 F.2d 1117 (11th Cir. 1983).

While the record does not reflect that Burnett actually wrote his check for payment and then delivered or offered to deliver that check to the Graffs, existence of such check is not necessary for resolution of the basic issue involved in this case. An additional absence in the record is more important and crucial in Burnett's appeal, namely, the absence of any evidence that Burnett, when he offered to pay by check, had sufficient funds on deposit at the bank on which such check would have been drawn. Although Burnett acknowledged that he would have to "run home and stop payment" of a check given to pay for the entire account at Graffs' farm, Burnett offered no evidence that he had sufficient funds deposited in his checking account to cover the check he would have delivered to Graffs. As a consequence of such absent evidence, Burnett failed in his burden to show that he had the present ability of immediate performance, an element required for an effective tender, when the claimed tender was made. See, *Mr. U Inc. v. Mobil Oil Corp., supra; Caha v. Nelson, supra.* Without tender of payment, Burnett did not satisfy the obligation underlying the liens on the horses, and Graffs' liens subsisted for disposition by the district court. Burnett's first assignment of error has no merit.

Burnett's second assignment of error alleges that the district court awarded the Graffs excessive damages and prejudgment interest. Graffs were entitled to retain possession of Burnett's horses until their agister's lien was satisfied. *Kroll v. Ernst*, 34 Neb. 482, 51 N.W. 1032 (1892); *Gates v. Parrott*, 31 Neb. 581, 48 N.W. 387 (1891). A party entitled to the benefit of an agister's lien may recover the reasonable value of the feed and care which are the bases of such lien. See § 54-201(2). See, also, *Stickell v. Haggerty*, 158 Neb. 34, 62 N.W.2d 107 (1954). Burnett has never disputed the reasonableness of the charges for the horses' feed and care at Graffs', as well as stud fees for the horses. The district court's judgment for $687 is supported by the evidence, and Burnett's claim that the court awarded excessive damages is without merit.

Burnett further contends that the district court should not have awarded prejudgment interest. In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 131, 317 N.W.2d 900, 905 (1982),

we stated:

> Prejudgment interest is allowable only when the amount of the claim is liquidated. Neb. Rev. Stat. § 45-104 (Reissue 1978). Where a reasonable controversy exists as to the plaintiff's right to recover and as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Burnett has not disputed the agreements involving the horses. At trial, Burnett did not take issue with the reasonableness of Graffs' charges for the services rendered. Additionally, on appeal, Graff concedes that "$500 was the agreed upon figure for stud fees" and "the fees for mare care and feed through October 16, 1984, were considered reasonable by the parties." Brief for Appellant at 8. Therefore, there was no controversy concerning Graffs' right to recover on their agreements with Burnett for mare care. By applied horsesense, the amount of such recovery is ascertained through the somewhat elementary process of multiplying the daily rate for care times the number of days on which the care was received, plus $500 for the stud fee, which produces the uncontroverted and liquidated sum of $687. There is no merit to Burnett's contention that prejudgment interest is not allowable under the circumstances.

In his final assignment of error, Burnett contends that the district court erred in denying his counterclaim for conversion and in failing to award him damages resulting from Graffs' wrongful detention of the horses. As we have previously stated, Graffs were entitled to retain possession of Burnett's horses until Graffs received a proper tender of payment. Because Burnett never tendered payment to Graffs, the district court correctly denied relief on Burnett's counterclaim.

The judgments of the district court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE INTEREST OF C.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. G.W., APPELLANT.

414 N.W.2d 277

Filed October 23, 1987. No. 87-008.

1. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence.
2. **Constitutional Law: Appeal and Error.** A constitutional issue not raised in the lower court will not be considered for the first time on appeal.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Kelly S. Breen of Laughlin, Peterson & Lang, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Maria R. Leslie, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The mother of C.W., a child, appeals from an order of termination of her parental rights. The child was first directed to the attention of the juvenile court of Douglas County, Nebraska, as the result of the investigation of the child's ingestion of Haldol, an antipsychotic medicine, in August of 1984. The mother failed to seek medical treatment for the child for a period in excess of 24 hours. The petition presented in the juvenile court in addition alleged that the mother was unable to provide a residence for the child, was sentenced to a term in the Douglas County Correctional Center, and was suffering from schizophrenia.

The court, after hearing, found the child to be one described by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), i.e., "homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian." The child was placed in the custody of the Nebraska Department of Social Services. Following the disposition hearing on December 19, 1984, the child was placed in foster care and the mother ordered to comply with a plan of rehabilitation.

A motion was filed in July of 1986 requesting termination

after a determination that the child is one described in § 43-247(3)(a); that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," Neb. Rev. Stat. § 43-292(6) (Reissue 1984); and that the natural mother was unable to discharge parental responsibilities because of a mental illness or mental deficiency, and there were reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period of time, § 43-292(5).

After a termination hearing, the court found by clear and convincing evidence that the above-stated allegations were true and terminated the parental rights. The mother appeals and assigns as error that § 43-292(6) is unconstitutional and that there was insufficient evidence to find either a violation of the rehabilitation plan or that she was unable to discharge her parental responsibilities due to a mental illness.

This court has held repeatedly that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987). Appellant argues that a higher standard is imposed when the subject is children of American-Indian descent. Neb. Rev. Stat. §§ 43-1501 et seq. (Cum. Supp. 1986). The constitutional issue was not raised in the lower court and will not be considered for the first time on appeal. *R.D.N. v. T.N.*, 218 Neb. 830, 359 N.W.2d 777 (1984).

As to the remaining issue, the evidence is unfortunately conclusive that the mother suffers from an incurable mental illness, chronic undifferentiated schizophrenia, and that she was, at the time of the first hearing and the final hearing, mentally incapable of caring for herself or anyone else. The mother "even has some disease related inability to comply with treatment."

The mother was destined by virtue of the mental condition never to be able to comply with any order of rehabilitation. The situation was hopeless from inception. The purpose of the extended hearing, orders, conferences, and therapy escapes us. The court finally did what should have mercifully been ordered immediately.

This court, on its own motion, notes that § 43-292 contains a

provision which requires a court to appoint a guardian ad litem for an alleged incompetent parent when termination proceedings are sought under subsection (5) of the statute. Given the language of this provision, we note that such appointments are mandatory, even if subsection (5) is but one of the findings upon which the termination is sought.

In the case at bar, the record reveals that appellant's attorney apparently served as her guardian ad litem as well. While we do not believe that this situation was prejudicial to appellant in this case, we urge that these appointments be separated for purposes of § 43-292(5). This court recently discussed the differences between the duties and role of a guardian ad litem versus those of an attorney in *Orr v. Knowles*, 215 Neb. 49, 53, 337 N.W.2d 699, 702 (1983), as follows:

> The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. See Canon 7. It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. EC 7-7.

A guardian ad litem, on the other hand, has the duty to determine the best interests of his or her ward without necessary reference to the wishes of the ward. As in the *Knowles* case, we do not believe that the duties and responsibilities of a guardian ad litem are coextensive with those of an attorney for purposes of § 43-292(5). The alleged incompetent's best interests would be better served by a separate appointment of a guardian ad litem who could independently assess available alternatives and the best course for that individual.

We have reviewed the matter de novo and conclude that the order terminating parental rights is supported by clear and convincing evidence. The order terminating appellant's parental rights is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

I concur in the judgment of the court. I dissent from that part of the opinion which suggests that a guardian ad litem should

have been appointed for the appellant even though she was represented by other counsel in the proceeding.

The purpose of appointing a guardian ad litem to represent an incompetent or a minor is to ensure that the interests of such a party are protected. *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959).

It is the duty of a guardian ad litem to protect the rights of the party he represents, regardless of the party's willingness to give them away. *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962).

Ordinarily, it is unnecessary to appoint separate counsel for a party who, because of a disability, is represented by a guardian ad litem. Similarly, where the party under disability is already represented by counsel, as in this case, it would seem unnecessary to appoint a separate guardian ad litem to carry on the defense.

Except in unusual situations, such as in *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), it should not be necessary to appoint a guardian ad litem to represent a party who is also represented by separate counsel.

COLWELL, D.J., Retired, joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. NEAL P. MADSEN, APPELLANT.
414 N.W.2d 280

Filed October 23, 1987. No. 87-025.

Search and Seizure: Evidence: Waiver. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

John P. Heitz of Cronin, Symonds & Heitz, for appellant.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Appellant, Neal P. Madsen, was found guilty by a jury in Holt County of the offense of assault in the second degree (Neb. Rev. Stat. § 28-309 (Reissue 1985)), i.e., intentionally or knowingly causing bodily injury to another with a dangerous instrument. Assault in the second degree is a Class IV felony. The penalty prescribed for a Class IV felony (Neb. Rev. Stat. § 28-105 (Reissue 1985)) is "[m]aximum-five years imprisonment, or ten thousand dollars fine, or both. Minimum-none." The court sentenced him to an indeterminate term of from 1 1/2 to 5 years in the Nebraska penal complex. A motion for new trial was overruled, and this appeal followed.

Three errors are assigned: "1. That the District Court erred in admitting the knife into evidence as an exhibit. 2. That the verdict was not sustained by sufficient evidence. 3. That the sentence imposed by the District Court, although within the statutory limits, was an abuse of discretion." We affirm.

We begin by a brief recitation of the facts. Madsen and a friend drove to the farm of the victim, Lumir Ratkovec, at approximately 6 p.m. on March 30, 1986. Madsen, who had consumed 8 to 10 beers prior to the journey, intended to secure tools that he had left on the Ratkovec farm. A confrontation with Ratkovec occurred. Madsen struck Ratkovec in the left chest. Ratkovec apparently touched the area with his hand and observed that the hand was covered with blood. Madsen fled with his companion in the van owned by Madsen. Subsequently, the van was stopped at Atkinson, Nebraska, and Madsen was arrested.

The treating physician testified that Ratkovec was stabbed. A tool mark examiner testified that a cut on Ratkovec's shirt was caused by a sharp instrument, and a forensic serologist testified the blood on Ratkovec's shirt and undershirt matched Ratkovec's.

During the drive from Ratkovec's farm, Madsen stated to his companion, "I knifed the son-of-a-bitch, he was fucking with me." The companion also observed Madsen holding a knife, which Madsen placed in a tray between the front seats of the van.

After Madsen's arrest, the van was driven to the Holt County

sheriff's office. The van was later subjected to an "inventory search," and a small knife and several tools were seized.

We observe first that the defendant failed to move to suppress the knife prior to trial, pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1985). We have previously held that objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial. *State v. Stowell*, 190 Neb. 615, 211 N.W.2d 130 (1973); § 29-822.

Objection was first made to the evidence at trial. Although an objection at trial is essential to our consideration of a claim that evidence was seized illegally, *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987), equally essential, at least in fourth amendment cases, is the pretrial motion to suppress, *State v. Stowell, supra*. The assigned error is without merit.

As to the second assignment of error, the evidence amply supports the conviction for second degree assault. Indeed, it is nearly conclusive. The assignment is without merit. See *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985). We pass to the last assigned error.

We have examined the sentencing proceedings and find the sentence is within the limits of the statute. The crime was violent and life threatening. We find no abuse of discretion.

AFFIRMED.

C. MICHAEL ANDERSON AND PETER HOCHSTEIN, APPELLANTS, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

414 N.W.2d 281

Filed October 23, 1987. No. 87-067.

Habeas Corpus: Prisoners. Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

C. Michael Anderson, pro se.

Peter Hochstein, pro se.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Appellants seek review of the district court's order sustaining the State's motion to quash their petition seeking a writ of habeas corpus, and dismissing their case. Although appellants specify eight different assignments of error, the only one pertinent to this proceeding is whether habeas corpus is an appropriate remedy under the circumstances of this case.

The appellants were convicted of first degree murder in the district court for Douglas County and were sentenced to death. Since that time, they have been incarcerated at the Nebraska Penal and Correctional Complex. The trial court's judgment was affirmed in *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

In their petition for a writ of habeas corpus the appellants allege that at some time after their sentences were imposed and they were remanded to the penal complex where the sentences were to be carried out, they were placed in administrative segregation or solitary confinement. This came about by reason of an administrative decision authorized by a change in the Nebraska Department of Correctional Services administrative rules and regulations. Such action, they claim, when added to their original sentences of death, constituted an ex post facto law contrary to the Constitution of the United States. They do not in any way allege that their sentences of death are void or that they are entitled to immediate release. At trial, appellant Anderson indicated that they were "[o]nly seeking an order remanding us back to Douglas County District Court for resentence but not to be released from our sentence to the

street."

Neb. Rev. Stat. § 83-4,114 (Reissue 1981), although providing certain limitations on the use of solitary confinement, expressly provides that such "provision shall not apply to segregation or isolation of persons for purposes of institutional control." Appellants allege that Nebraska Department of Correctional Services Administrative Rules and Regulations, ch. 4, rule 6(16) (1985), establishes that all inmates who are under the sentence of death will be kept in administrative segregation.

However, it is not necessary for us to address appellants' claim relating to solitary confinement. That was not a part of the original sentences of the district court and has no relationship to them. As we stated in *Mayfield v. Hartmann*, 221 Neb. 122, 123, 375 N.W.2d 146, 148 (1985):

> We believe that we need not address the many issues raised by [the petitioner], for the simple reason that even if all of the issues raised by [the petitioner] were valid, a matter we do not decide, he was still not entitled to relief in the form of habeas corpus.

In *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977), the petitioner attempted to raise the issue of his confinement in the adjustment center of the penal complex by means of a petition for habeas corpus. The district court denied his petition, stating that habeas corpus was not available to challenge conditions of confinement. In affirming that judgment, this court stated:

> The question is whether the writ of habeas corpus is a proper remedy for that purpose.
>
> This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. . . . Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. . . . *The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.*

(Emphasis supplied.) *Id.* at 856, 251 N.W.2d at 181. See, also,

Hrbek v. Shortridge, 223 Neb. 785, 394 N.W.2d 285 (1986).

The action of the district court in quashing appellants' petition and dismissing their case was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KENNETH RICHARD PAYNE, RESPONDENT.
414 N.W.2d 283

Filed October 23, 1987. No. 87-577.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On June 24, 1987, Counsel for Discipline of the Nebraska State Bar Association filed a motion for reciprocal discipline in this court, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1986), and moved for this court to enter an order disbarring the respondent, Kenneth Richard Payne, from the practice of law in the State of Nebraska. Rule 21(A) states: "Upon receipt by the Court of appropriate notice that a member has been disbarred or suspended in another jurisdiction, the Court shall enter an order imposing the identical discipline . . . ."

The record indicates that on July 10, 1986, the respondent was disbarred by order of the Indiana Supreme Court. See *Matter of Payne*, 494 N.E.2d 1283 (Ind. 1986). The Indiana court held that possession and use of cocaine; purchasing and possessing marijuana, unspecified narcotics, and cocaine; failure to appear for a client at a hearing; and accepting cocaine as payment for legal services warrants disbarment. *Id.* Respondent has also been disbarred in Colorado. See *People v. Payne*, 738 P.2d 374 (Colo. 1987) (Colorado court held that reciprocal discipline should be imposed on attorney who has already been disbarred in another state).

On September 15, 1987, respondent was ordered to show cause on or before October 1, 1987, why the motion for reciprocal discipline should not be sustained. On October 2, 1987, Counsel for Discipline filed a motion for judgment on the pleadings after respondent failed to respond to this order.

After a careful review of the record, we find that there exists no issue of fact or law. Therefore, pursuant to rule 21(A), it is the order of this court that the respondent, Kenneth Richard Payne, be, and hereby is, disbarred from the practice of law, effective immediately.

JUDGMENT OF DISBARMENT.

GUS T. PALLAS, INDIVIDUALLY, GEORGE A. PALLAS, AND GUS T. PALLAS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES C. PALLAS, DECEASED, APPELLEES, V. LEON F. BLACK, APPELLANT.

414 N.W.2d 805

Filed October 30, 1987. No. 85-997.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance is an equitable matter triable de novo on appeal to this court.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court tries the factual issues presented de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Appeal and Error.** The Nebraska Supreme Court is obligated to reach its own independent conclusions on questions of law.
4. **Statute of Frauds.** A memorandum otherwise adequate to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984) need be signed only by the party to be charged.
5. _____. In order to satisfy the provisions of Neb. Rev. Stat. § 36-105 (Reissue 1984), a memorandum, in addition to being signed by the party to be charged or by his or her agent actually or apparently authorized to do so, must state with reasonable certainty, (1) each party to the contract either by his or her own name, or by such a description as will serve to identify him or her, or by the name or description of his or her agent, (2) the land, goods, or other subject matter to which the contract relates, and (3) the terms and conditions of all the promises

constituting the contract and by whom and to whom the promises are made.

6. **Specific Performance: Equity.** If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.
7. **Specific Performance: Real Estate: Vendor and Vendee.** Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
8. **Specific Performance: Proof.** A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
9. **Specific Performance.** The mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Warren S. Zweiback and Scott H. Rasmussen of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

James T. Gleason of Swarr, May, Smith & Andersen, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant, Leon F. Black, appeals from a decree of specific performance entered in favor of the plaintiffs-appellees, Gus T. Pallas, individually, George A. Pallas, and Gus T. Pallas, personal representative of the estate of James C. Pallas, deceased, ordering the purchase by Black of certain improved real estate from plaintiffs, directing Black to pay plaintiffs $13,600 due pursuant to the agreement together with $842.23 for real estate taxes, and directing plaintiffs to convey "clear title" in and to the property to Black. Black's six assignments of error may be resolved by determining whether (1) there existed an enforceable contract for the purchase of the property by Black, (2) the plaintiffs evidenced an ability to convey marketable title thereto, and (3) specific performance is the appropriate remedy. We affirm.

The property, commonly known as 2727 Q Street, Omaha,

Douglas County, Nebraska, was acquired in equal shares by Thomas Pallas and his brother, James C. Pallas, on October 9, 1946. Thomas died in 1968, leaving his share to his widow, Fania Pallas. On September 21, 1968, Fania transferred her interest by quitclaim deed to her sons, the plaintiffs Gus and George, in equal shares. Subsequently, George either gave his share to Gus or appointed Gus as his representative in the management of the property. In any event, George testified he stood "ready" to execute a deed transferring whatever interest he might have to Black.

On September 9, 1977, James and his wife, Dorothy, executed a nondurable power of attorney appointing James' nephew Gus their attorney in fact for the purpose of handling and taking "care of our financial affairs, and to [sic] all matters pertaining thereto."

James was injured in a fall sometime in 1979, and thereafter resided in a nursing home until his death on April 11, 1982, at the age of 95. Gus and George visited their uncle at the home at least every other day. During some of these visits, James did not understand business questions his nephews tried to discuss, but at other times he did. James' last will and testament, dated March 10, 1977, devised all his property to his wife and named Gus as executor. The will further provided, however, that if Dorothy should die before James, his undivided one-half interest in the subject property was to be inherited by Gus and his wife, Rose. James' will was admitted to probate on May 20, 1982, and Gus was appointed as the personal representative of his uncle's estate. The probate proceeding, by failing to name Dorothy as one of James' heirs at the time of his death, establishes that Dorothy died before her husband and that, as a consequence, title to James' undivided one-half interest in the subject property vested in Gus and Rose.

The parties stipulated that at all times relevant to this litigation, George's wife, Finija, and Gus' wife stood ready, willing, and able, at the request of their respective husbands, to execute any documents reasonably required to effect the transfer of the property to Black. Gus testified that at all times relevant to this litigation, he has been ready, willing, and able to convey the property to Black, both on his own account and on

behalf of his Uncle James' estate.

In May 1975, the property was leased for a term of 18 months to Pancho's, Inc., a corporation controlled by Black and on behalf of which corporation Black signed the lease. Pancho's operated a tavern on the property, having purchased the business from its previous operators. Black testified that in this purchase he, acting as Pancho's, Inc., had acquired "all of the furniture, bar stools and, to the best of [his] knowledge, the back bar . . . everything that was in the building." The record indicates, however, that the bar and back bar were not in fact transferred to Black by Pancho's predecessors in title to the business.

On September 23, 1977, the property was again leased to Pancho's for a term of 1 year, with two 1-year extension options. Black again signed this lease on behalf of Pancho's. Pancho's exercised both of its extension options under this second lease, thereby extending the lease through October 31, 1980.

In the summer of 1980, Black initiated discussions with Gus about buying the real estate. Following those discussions, Black signed and sent the following letter to Gus:

July 9, 1980

. . . .

Dear Gus,

I hereby agree to pay $20,000.00 for the premises located at 2727 Q Street. The $20,000.00 will be paid as agreed upon with a down payment of $5,800.00. The balance with 11% interest will be paid in monthly payments over 4 years, no payment to be less than $300.00. Also, I will continue to make the monthly rent payments for the duration of the lease which expires October 31, 1980.

A check for $5,800.00 is attached herewith. The final documents will be drawn up by my attorney for your review and approval along with the schedule of payments as soon as possible.

> It is my intention to begin removing various items from the building beginning this Friday and continuing until completed.
>
> Very truly yours,
>
> Leon F. Black

Gus testified that this letter expressed the terms of the agreement which had been reached between himself and Black. Accompanying the letter was a $5,800 check, drawn on Black's behalf, payable to Gus' order.

After July 9, 1980, the only key to the building was in Black's possession. The weekend following receipt of the letter of July 9, Gus visited the property and found a crew of laborers removing the "fancy, old-fashioned ceiling" and wall paneling from the property. At a later time, the bar and back bar were removed as well.

After July 9, 1980, plaintiffs made no effort to lease the property to anyone, viewing the property as belonging to Black. Black, however, did take steps to lease the property. On November 29, 1982, he, as "Black & Associates," executed a document captioned "Business Property Lease," purporting to lease the property for a term of 1 year and 11 months to Kathleen Alston Curtis, to be used by her to operate a tavern, for a rental of $150 per month, total rent being $3,450 over the term of the lease. Black testified that he entered into this lease as an accommodation to Gus, but admitted he never informed Gus of that fact. Plaintiffs continued to pay the real estate taxes as they came due through March 27, 1984, a total amount of $842.23.

On August 28, 1980, Black wrote and signed the following letter to Gus:

> Dear Gus,
>
> Enclosed herein is a check in the amount of $430.00 for 2 months rent, and also a check in the amount of $600.00, which is the minimum monthly payment we agreed to. This monthly payment for the land contract will be properly computed with a schedule of payments in the near future.

You should be hearing from Roy Breeling, our attorney, to obtain the information he needs to prepare these papers.

Sorry for the delay, but I've been super busy.

Very truly yours,

Leon F. Black

. . . .

cc: Roy Breeling

A Pancho's, Inc., check in the amount of $430 and a check drawn by Black on the same account as the $5,800 check accompanying the July 9, 1980, letter accompanied this letter.

In accordance with Breeling's request, Gus delivered to Breeling a copy of the power of attorney from James and the abstract of title to the property. A letter to Gus from Breeling dated November 11, 1980, acknowledged receipt of the abstract, and on April 13, 1981, Breeling advised Gus to treat the $5,800 and $600 checks as "earnest money deposits," but Breeling never produced a writing which, in Gus' opinion, accurately reflected the agreement he and Black had reached.

The building was permitted to deteriorate to the point that it was ultimately condemned as a nuisance and torn down by the city of Omaha sometime after 1982.

We begin by noting that an action for specific performance is an equitable matter triable de novo on appeal to this court. *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 348 N.W.2d 903 (1984). As such, we try the factual issues presented de novo on the record and reach a conclusion independent of the findings of the trial court, provided that where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Johnson v. NM Farms Bartlett, ante* p. 680, 414 N.W.2d 256 (1987); *Hughes v. Enterprise Irrigation Dist., ante* p. 230, 410 N.W.2d 494 (1987); *Platte Valley Fed. Sav. & Loan Assn. v. Gray, ante* p. 135, 409 N.W.2d 617 (1987); Neb. Rev. Stat. § 25-1925 (Reissue 1985). Of course, we are obligated to reach our own independent conclusions on the

questions of law presented. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985); *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984); *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983).

In connection with the first issue, Black argues that there exists no sufficient written memorandum of the agreement to purchase the property such as to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984). That statute provides in relevant part: "Every contract . . . for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the . . . sale is to be made."

Black's argument is based in part upon the premise that the foregoing statutory language means that the vendor must sign any document which purports to be a memorandum of an agreement to sell real estate. That premise, however, is erroneous.

More than a hundred years ago, in *Gartrell v. Stafford*, 12 Neb. 545, 11 N.W. 732 (1882), this court announced the rule that to authorize specific performance under a statute of frauds in all material respects identical to § 36-105, only the party to be charged need have signed the memorandum. In so holding, this court examined English precedent and concluded: "It is sufficient if the contract or memorandum thereof is signed by the party to be charged, that is, by the vendor . . . ." *Id.* at 553, 11 N.W. at 735. As in subsequent cases, the vendor in *Gartrell* was the person to be charged, and the *Gartrell* court's use of the word "vendor" was intended only to identify the party in the case before it as "the party to be charged." E.g., *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973); *Horn v. Stuckey*, 146 Neb. 625, 20 N.W.2d 692 (1945). In this case Black is the party to be charged, and, therefore, it is his signature which is required.

Black also asserts that his letter of July 9, 1980, cannot support an order of specific performance because it does not contain a sufficient statement of the terms of the agreement to serve as an adequate memorandum. This court stated the applicable rule in *Hansen v. Hill*, 215 Neb. 573, 578, 340 N.W.2d 8, 12 (1983):

> " 'A memorandum, in order to make enforceable a contract within the Statute [of Frauds], may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.' "

See, also, *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976). Black's letter of July 9, 1980, clearly satisfies these requirements.

Having concluded that the first issue must be resolved adversely to Black, we turn our attention to whether plaintiffs evidenced an ability to convey marketable title. While Black does not question the adequacy of the language of the power of attorney James executed to empower Gus to enter into an agreement to sell James' interest in the property, Black does urge that James was not competent to so authorize Gus. However, the question of James' competency at the time he executed the power of attorney becomes immaterial in view of his earlier testamentary disposition. While Black suggests no evidence of marketable title in plaintiffs was presented to him, the fact of the matter is that the record establishes plaintiffs provided Black's attorney with an abstract of title and that no defect in plaintiffs' title has been claimed.

Thus, we reach the third issue, whether specific performance is an appropriate remedy. We have said that if one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party. *Farmers Underwriters Assn. v. Eckel*, 185 Neb. 531, 177 N.W.2d 274 (1970). However, the fact that the remedy of specific performance is not available to one party to a contract is not sufficient reason for refusing specific performance to the other party. *Id.* Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract

of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations. *Perry v. Ritze*, 110 Neb. 286, 193 N.W. 758 (1923). Plaintiffs tendered performance of their contractual obligations by executing appropriate deeds conveying their respective interests to Black. Further, plaintiffs, at all times relevant to this litigation, remained ready, willing, and able to tender performance of their contractual obligations. The doctrine of mutuality will not prevent a court of equity from ordering specific performance under such circumstances. *Id.* See, also, *Reifschneider v. Nebraska Methodist Hospital*, 212 Neb. 91, 321 N.W.2d 445 (1982), which holds that a party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.

Finally, Black objects to the order of specific performance because the building has been torn down. Generally, the mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith. *Sinclair Refining Co. v. Miller*, 106 F. Supp. 881 (D. Neb. 1952); *City of University Place v. Lincoln Gas & Electric Light Co.*, 109 Neb. 370, 191 N.W. 432 (1922). There is no showing in the record before this court that plaintiffs acted fraudulently or with bad faith.

We conclude from our review that the judgment of the district court should be, and hereby is, affirmed.

AFFIRMED.

ROSLYNN THOM, APPELLEE, V. LUTHERAN MEDICAL CENTER AND ALEXSIS, INC., APPELLANTS.

414 N.W.2d 810

Filed October 30, 1987. No. 87-126.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.
3. _____: _____. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
4. **Workers' Compensation.** While there is no numerical formula for determining one's earning power following an injury to the body as a whole, the percentage of body as a whole impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
5. _____. Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986) permits an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.
6. **Workers' Compensation: Appeal and Error.** The compensation court's determination on rehearing of a worker's ability to return to work for which he or she is fitted by previous training or experience is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
7. _____: _____. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael A. Fortune and Jerald L. Rauterkus of Erickson & Sederstrom, P.C., for appellants.

Scott M. Kirshenbaum of Brodkey Law Offices, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The defendant employer, Lutheran Medical Center, at Omaha, and its insurer, Alexsis, Inc., appeal the Workers' Compensation Court award of benefits to the plaintiff-appellee employee, Roslynn Thom. The issues presented by the assignments of error argued by appellants are whether the evidence supports the compensation court's findings that Thom (1) suffered a loss of earning power and (2) is entitled to vocational rehabilitation services. We affirm.

The parties stipulated that on April 7, 1985, Thom, a registered nurse, suffered an injury to her back, while lifting a patient, in an accident arising out of and in the course of her employment as a staff nurse. After seeing an emergency room physician, Thom went to her family physician, who referred her to a neurosurgeon. In June 1985, she underwent the removal of two herniated disks. On January 31, 1986, the treating neurosurgeon released Thom to return to work, having stated she had a 7- to 10-percent disability of the body and would be limited in terms of lifting, bending, stooping, and sitting for prolonged periods of time. Thom later saw an orthopedist, who was of the opinion that she suffered a 20- to 25-percent disability of the body.

Thom testified that she continues to have back pain which radiates to her left leg and produces numbness.

Thom is a 36-year-old high school graduate who has been employed in the nursing field since 1977. She first became licensed as a practical nurse and later obtained an associate degree in nursing science. She had worked at Lutheran Medical Center since 1980 and at the time of the accident was earning $9.46 per hour, or $19,676.80 per year, as a staff nurse caring for patients. After being released by the treating neurosurgeon as having reached maximum improvement, Thom was unsuccessful in her efforts to find employment in which she could use her training and experience.

A vocational rehabilitation specialist provided placement assistance to Thom from December 1985 to February 1986, when the effort was terminated. During this period, the

specialist and Thom discussed the possibility that Thom return to school. Thom ultimately enrolled in a college in order to obtain a bachelor's degree in business with a focus on "accounting and computers," a program which will take 2 years of full-time study. The evidence is that the program of study Thom is pursuing leads to jobs with entry level salaries of between $18,000 and $24,000 per year.

After she finished working with Thom, the vocational rehabilitation specialist conducted a labor market survey, looking for jobs which existed in the Omaha area which could be performed within Thom's physical limitations and suitable for one with her training and experience. The specialist found several light and sedentary jobs to exist, such as supervising nurse, nursing home director, admissions director, and industrial nurse. The jobs paid up to $27,800 per year.

It was this witness' opinion that Thom was employable without further training, but she admitted that a degree would enhance Thom's employability and that the accident made her less employable than she had been. The vocational rehabilitation specialist also testified that, while in her judgment it was probable that Thom could have obtained the jobs she described, there were a variety of factors other than physical qualifications to be considered. The witness admitted that a person with a degree would be preferred over one without a degree and that at least one prospective employer had stated a predilection for hiring from within its organization. This specialist did not attempt to actually place Thom in a job.

The coordinator of a medical employment pool which makes most of its placements in temporary work testified that there were jobs which Thom could perform within her physical limitations, such as directing nurses in a home health care agency, taking care of premature babies, adjusting for insurance companies, and working in a doctor's office. These jobs would pay between $8.50 and $10 per hour, or up to $20,800 per year, assuming a 40-hour week. It was also this witness' opinion that Thom was employable without further education or training.

The employment coordinator for Lutheran Medical Center testified that Thom's application for employment with the

center as a utilization review coordinator was rejected because there were other better qualified applicants and that Thom's inquiry regarding employment as a staff nurse in the center's addictive diseases section was answered negatively because of her physical limitations. This witness testified that the health care industry is undergoing changes, but notwithstanding the fact that the center is reducing its nursing staff, there is "kind of a nursing crunch and we are having a hard time filling nursing positions right now, but they are staff nursing positions."

This case is resolved by the oft-repeated principle that the findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Nice v. IBP, inc., ante* p. 538, 412 N.W.2d 477 (1987); Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986).

Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). Earning power is synonymous neither with wages, *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985), nor with loss of physical function, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980). Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole, *Aldrich v. ASARCO, Inc., supra*, the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power. E.g., *Smith v. University of Nebraska Medical Center*, 201 Neb. 730, 271 N.W.2d 852 (1978), *modified after reh'g on other grounds* 202 Neb. 493, 276 N.W.2d 86 (1979), upholding an award equivalent to a 10-percent loss of earning power based on medical opinions that the employee suffered a 10- to 40-percent

impairment of her body as a whole.

The range of expert medical opinions that Thom's physical limitations translated to a permanent partial disability of from 7 to 25 percent of the body as a whole, the fact that she has been unable to find employment, and the evidence that her employment prospects have been diminished as a result of the accident support the compensation court's finding that at present Thom suffers a 25-percent loss of earning power.

The next question is whether the evidence supports the award of vocational rehabilitation benefits.

The bases for awarding vocational rehabilitation are found in Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986), which reads in relevant part as follows:

> (3) . . . When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. . . .
>
> . . . .
>
> (6) Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for . . . partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education, if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the compensation court or judge thereof to be suitable for him or her or refuses to be evaluated under the provisions of subsection (3) of this section, the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under [Neb. Rev. Stat. §§ 48-101 to 48-151 (Reissue 1984

& Cum. Supp. 1986)].

In *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980), this court held that those provisions read together permit an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.

Just as we have held the determination of a worker's ability to return to work for which he or she is fitted by previous training or experience is a factual question which will not be disturbed on appeal to this court unless clearly wrong, *Nice v. IBP, inc., ante* p. 538, 412 N.W.2d 477 (1987), we hold the determination that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.

Lutheran Medical Center, in arguing that the evidence does not support the compensation court's finding, places heavy reliance upon *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). This court affirmed the compensation court's denial of vocational rehabilitation in that case on the basis that the evidence supported the compensation court's finding that such would not serve the employee's best interests. The evidence in *Pollock* was that the employee did not have the background to undertake the course he wished to pursue, his future ability to meet the changing requirements of the industry he wished to enter was uncertain, and the availability of future employment was uncertain.

Such, however, is not the situation in this case. While the evidence is not overwhelming, it nonetheless permits inferences that the changing nature of the health care industry reduces employability for registered nurses who cannot function as staff nurses and who lack advanced training or education and that the rehabilitation services awarded would reduce the amount of earning power Thom would otherwise lose. The evidence thus supports the compensation court's specific finding that the vocational rehabilitation awarded will reduce the amount of earning power Thom would otherwise lose and

its implied finding that the rehabilitation is in Thom's best interests, to the extent that these findings cannot be said to be clearly wrong.

Since the effort at rehabilitation is aimed at reducing the earning power loss Thom presently suffers, the compensation court properly suspended payment of benefits for said present loss and awarded compensation for temporary total disability during the period of vocational rehabilitation. At the conclusion of the rehabilitative effort, the extent of Thom's loss of earning power will need to be reconsidered. § 48-162.01.

Pursuant to the provisions of Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986), Thom is awarded the sum of $1,000 to apply toward the fee of her attorney for services rendered in this court.

AFFIRMED.

OMAHA MINING COMPANY, INC., DOING BUSINESS AS THE VIDEO STATION, ET AL., APPELLANTS, V. FIRST NATIONAL BANK OF BELLEVUE, APPELLEE.

415 N.W.2d 111

Filed November 6, 1987. No. 85-973.

1. **New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
2. **New Trial: Liability: Damages: Verdicts: Appeal and Error.** When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
3. **Motions for New Trial: Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.

4. **Jury Instructions: Appeal and Error.** The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and reversed and remanded for a new trial.

Del Pelton of Pelton, Bertolini, Schroeder, Veith and O'Neal, for appellants.

John W. Wilke of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit to recover damages for interference with a business relationship. The jury returned an $85,000 verdict in favor of plaintiffs, Omaha Mining Company, Inc. (Mining), doing business as The Video Station, and David R. Head, its president, against defendant, First National Bank of Bellevue (Bank). Defendant's motion for a new trial was denied as to liability; however, it was granted on the issue of damages upon the court's finding that its damages instruction to the jury was incomplete. Plaintiffs' appeal assigns as error that the judge had no authority to set aside the award of damages where there was evidence to support it. Defendant does not cross-appeal.

The petition also stated a second cause of action, alleging defamation caused by defendant's filing a replevin suit against plaintiffs. This second cause was dismissed at the close of plaintiffs' evidence.

We affirm the trial court's ruling on the issue of damages. For other plain prejudicial errors appearing in the jury instructions later discussed, we reverse and remand for a new trial on all issues.

The testimony of three of the witnesses is before us. David Head and Michael L. Sullivan, attorney for Applause Video Corporation, testified for plaintiffs. Allan Lee Caplan testified for defendant.

Mining is a holding company owned by plaintiff Head; it sells and rents videotapes retail and sells tapes wholesale in

Bellevue, Nebraska. Mining owed the Bank $22,600 on three notes secured by a lien on Mining's inventory of tapes, furniture, and fixtures. Head cosigned these notes. Head also owed the Bank about $18,600 on personal notes. For about a year prior to June 1984, the customer relationship between Head and the Bank had been negative; the Bank had requested Head to obtain credit elsewhere. In June 1984, Head had a need for cash to protect a $2,500 real estate option and to pay a tape supplier a past-due account of $8,000. Head also wanted to sell all of The Video Station's assets, including 5,000 tapes, and then concentrate on Mining's wholesale business. He contacted Allan Caplan, the owner of Applause Video, which operated more than 15 retail videotape stores in the Omaha area. They discussed Applause's buying a large number of tapes, later agreed to be 1,223 tapes, which was a selected number that avoided certain notice provisions of the Nebraska bulk sales act. In late July 1984 Head met with Caplan and Sullivan at Head's office to further discuss the sale. Caplan made inquiry about getting a release of the lien on the tapes. Head called Denny Gilbert, an official at the Bank, explained the proposed sale of 1,223 tapes, and requested approval of the Bank to release its lien. It was at this point that plaintiffs' claims of interference began. Head reported to Caplan and Sullivan that Gilbert said that the Bank would not release its lien on the 1,223 tapes unless all sale proceeds were paid to the Bank and applied to all of Mining's and Head's loans, totaling about $41,000, although none were then due. Head then told Caplan that he could not sell the tapes because he needed the money for purposes other than to pay the Bank.

The negotiations continued, however, and a further effort was made by Caplan to secure the Bank's agreement to release the lien. At one point Head testified that a Bank official told him that he had to sell the tapes to Caplan and that if he did not, the Bank would call all of his notes and put him out of business. Head was later informed by his attorney that the Bank could not call notes before they were due. The two negotiators had also been discussing the possible sale of all Mining's retail store assets to Applause. Caplan's attorneys drafted two detailed contract proposals, the principal provisions of which are

summarized as follows: (1) the sale of 1,223 tapes for a consideration of $36,690 or $30 per tape and a noncompetition clause and (2) the sale of all assets, with the cash consideration space left blank and no values placed on any particular asset. On August 2, 1984, the parties met to discuss the contracts; neither was signed and no agreement on the terms was reached. Caplan later offered $27 a tape, but this offer was rejected by Head. That was the end of the negotiations. Defendant filed a replevin suit that was dismissed, and this suit followed. There was no clear evidence as to the cost value for the tapes other than that Mining carried them on its inventory as valued at $12.27 each. In November 1984, Applause bought 1,000 tapes from Mining's wholesale operation for $22.50 each, and in March 1985, it bought another 1,833 tapes for about $26 apiece.

> A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.

Hegarty v. Campbell Soup Co., 214 Neb. 716, 720-21, 335 N.W.2d 758, 762 (1983).

> The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.

Id. at 720, 335 N.W.2d at 762.

> When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.

Id. at 726, 335 N.W.2d at 765.

At the instruction conference, counsel for both parties made no objection to the judge's proposed instructions that were later read and delivered to the jury, including the damages instruction, No. 7:

> If you find for the plaintiffs, then it is your duty to fix the amount of money which will fairly and reasonably

> compensate the plaintiffs for the damage proven by a preponderance of the evidence to have proximately resulted from the interference by the defendant.
>
> You are not permitted to allow any damages by way of punishment or sympathy. Your verdict must be based upon the evidence and not upon speculation, guess or conjecture.

This instruction conforms with the general rule that the plaintiff can recover such damages sustained as are the natural and proximate consequence of the interference. See 45 Am. Jur. 2d *Interference* § 58 (1969).

Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial. *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Vistron Corp. v. Scoular-Bishop Grain Co.*, 194 Neb. 696, 234 N.W.2d 906 (1975).

The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979).

Caplan took great pride in his business acumen to negotiate favorable business deals and said that the $27 figure was part of his negotiation plan. There is a close fact question whether defendant's alleged acts of interference either changed the price per tape factor or affected Caplan's negotiation strategy.

Plaintiffs claim that the negotiations between Head and Caplan for their respective businesses was a business relationship, having the elements of proof stated in *Mike Pratt & Sons, Inc. v. Metalcraft, Inc.*, 222 Neb. 333, 383 N.W.2d 758 (1986), which were included in the court's instruction No. 5. That relationship is better described in the Restatement (Second) of Torts § 766B (1979).

Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Comment:

a. . . . In order for the actor to be held liable, this Section requires that his interference be improper. The factors of importance in determining this issue are stated and explained in § 767 . . . .

The Restatement, *supra* at 20.

Factors in Determining Whether Interference is Improper

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

The Restatement, *supra*, § 767 at 26-27.

Under this record the rule for damages would include:

Damages

(1) One who is liable to another for interference with a

contract or prospective contractual relation is liable for damages for

(a) the pecuniary loss of the benefits of the contract or the prospective relation;

(b) consequential losses for which the interference is a legal cause; and

. . . .

Comment:

. . . .

b. . . . And when the defendant's interference is with prospective contractual relations, the plaintiff may recover for the loss of profits to be made out of the expected contracts.

c. A major problem with damages of this sort is whether they can be proved with a reasonable degree of certainty.

The Restatement, *supra*, § 774A at 54-55.

In the case at bar, the issue of damages is narrowed by the allegations in paragraph X in plaintiffs' petition, "That the actions by Defendant caused a breakdown in the contractual relationship between Plaintiff[s] and Mr. Caplan, causing a *loss to Plaintiff[s] of the income that would have been derived from the sale of the video tapes and/or business to Mr. Caplan*." (Emphasis supplied.)

An instruction that misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967).

The trial judge's ruling that instruction No. 7 was incomplete was correct under the pleadings and the evidence for these reasons: (1) The issue of damages was limited by the pleadings to that loss of income caused by the tortious acts of defendant. (2) There was neither a definition nor guideline for the jury to follow in determining "loss of income." (3) The evidence purporting to support recoverable damages under the alternative contract proposal for the sale of all retail assets is all speculative, including the contract price for all of the assets being sold. At most, plaintiffs argue that about 5,000 tapes worth $30 each were in the inventory, which computes to $150,000 without assigning any values to other included assets.

The jury should have been instructed to disregard the proposed contract for the sale of all retail assets and all evidence supporting it.

There was no abuse of discretion by the trial judge in ordering a new trial on the issue of damages.

There is one other instruction error that relates to presenting defendant's affirmative defenses to the jury.

When the plaintiffs proved a prima facie case, it became incumbent upon the defendant to prove its alleged affirmative defenses of justification and privilege. 45 Am. Jur. 2d. *Interference* § 56 (1969). Those defenses and issues must be included in the jury instructions. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979). Instruction No. 5 generally follows NJI 2.01 as a statement of plaintiffs' case, their burden of proof, and the effect of the jury findings. It did not provide like guidance for defendant's affirmative defenses, as suggested in NJI 2.02, and those affirmative defenses are not otherwise properly included in the instructions. It was not enough for instruction No. 3 to copy verbatim from defendant's answer its claims, defenses, and affirmative defenses. This instruction procedure has been criticized. *Nebraska State Bank v. Dudley*, 194 Neb. 1, 229 N.W.2d 559 (1975). The failure to clearly include an instruction to guide the jury concerning defendant's affirmative defenses was plain error, Neb. Rev. Stat. § 25-1911 (Reissue 1985), prejudicial to defendant, requiring reversal for a new trial on all issues.

AFFIRMED IN PART, AND REVERSED AND REMANDED FOR A NEW TRIAL.

LEE C. LARSON ET AL., APPELLANTS, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, MIDLANDS DEVELOPMENT CO., A NEBRASKA GENERAL PARTNERSHIP, ET AL., INTERVENORS-APPELLEES.

415 N.W.2d 115

Filed November 6, 1987. No. 85-1000.

Mandamus. The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

John C. Mitchell of Mitchell & Demerath, Richard E. Croker of Croker, Huck & McReynolds, and J. Patrick Green, for appellants.

Charles K. Bunger, Assistant Omaha City Attorney, for appellee.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman, for intervenor-appellee Midlands Development Co.

Patrick W. Kennison of Kutak Rock & Campbell, for intervenor-appellee Mangimelli.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Plaintiff landowners appeal the judgment of the district court, which dismissed their petition for a writ of mandamus. By petitioning for such writ, the plaintiffs sought to compel the City of Omaha to revoke a development permit issued to intervenor Midlands Development Co. (Midlands), which allowed Midlands to remove dirt from the floodway and place it in the flood plain of Big Papillion Creek, thus changing the line of the floodway.

Although the trial court made certain findings of fact and law pertaining to the merits of plaintiffs' contention, it concluded that the demurrers of the defendant and the intervenors should have been sustained on the basis of the

plaintiffs' having an adequate remedy available by way of declaratory judgment action and by injunctive relief. We agree with the conclusion of the district court.

Generally, no construction is allowed in the floodway of a creek, but a plan submitted by the engineers of Midlands would increase the carrying capacity of the stream so as to allow for construction of a development project. Relying upon this plan, the City of Omaha granted the necessary permit under the provisions of the flood plain regulations of the Omaha zoning ordinance, Omaha Mun. Code, ch. 55, art. V, § 55-117 (1980).

At the time this present action was filed, two other actions were pending, one in this court and one in the district court for Douglas County, relating to these proceedings: *Wupper v. Shukert*, 220 Neb. xx (case No. 84-880, Sept. 12, 1985), and *Giger v. City of Omaha*, Douglas County District Court, docket 843, page 733. These actions sought declaratory and equitable relief. Similarly, a declaratory judgment action would be available to determine the constitutionality of the Omaha Municipal Code regarding the issuance of a permit without a prior hearing, which issue the plaintiffs sought to raise by this mandamus action.

"The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Neb. Rev. Stat. § 25-2157 (Reissue 1985). See, also, *Watts v. City of Omaha*, 184 Neb. 41, 165 N.W.2d 104 (1969).

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CAELI ASSOCIATES, INC., A NEBRASKA CORPORATION, APPELLANT, V. FIRESTONE TIRE & RUBBER COMPANY, AN OHIO CORPORATION, APPELLEE.

415 N.W.2d 116

Filed November 6, 1987. No. 86-033.

1. **Declaratory Judgments.** Ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

2. _____. The availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief.
3. _____. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute.
4. **Breach of Contract: Leases.** An action for breach of a lease presents an action at law.
5. **Appeal and Error.** In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, it presumes that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party.
6. _____. In an action at law tried without a jury, the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside on appeal to the Nebraska Supreme Court unless they are clearly wrong.
7. **Breach of Contract: Leases.** In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Frank Meares, for appellant.

Jon S. Reid of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Appellant landlord, Caeli Associates, Inc., a Nebraska corporation, brought an action pursuant to the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), seeking a declaration that appellee tenant, Firestone Tire & Rubber Company, an Ohio corporation, had breached the terms of the lease under which it occupied property owned by Caeli, and should therefore vacate the premises. The trial judge, sitting without a jury, dismissed Caeli's petition, and this appeal followed. For the reasons discussed hereinafter, we affirm.

We begin by calling attention to the fact that, ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law,

Zarybnicky v. County of Gage, 196 Neb. 210, 241 N.W.2d 834 (1976), and that the availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief, *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). It would seem that either a proceeding for forcible entry and detainer under the provisions of Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1985) or one for breach of contract is a remedy which is at least as serviceable as is this action for declaratory judgment. Thus, we question the propriety of the present action. However, as Firestone has not complained of the remedy sought by Caeli, we elect in this instance to review the issues presented by Caeli's assignments of error, which are that the trial judge erred in finding that Firestone did not breach the lease by (1) defeating the percentage rental provision, (2) rendering the demised building unsafe, (3) diminishing the value of the leasehold, and (4) making certain unauthorized alterations and engaging in other prohibited conduct, and that the district judge further erred by (5) finding that Caeli had waived the right to complain of certain alterations made by Firestone.

Before we can proceed further with our task, we must determine the scope of our review. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). The dispute before us concerns whether Firestone has forfeited its right to detain, that is, keep possession of, the demised premises by virtue of having violated certain lease provisions. Thus, the dispute takes on the character of an action for breach of the lease, a type of contract. As such, the present action is to be treated as one at law. *Washington Heights Co. v. Frazier, ante* p. 127, 409 N.W.2d 612 (1987); *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984).

The premises in question are located on the northeast corner of 60th Street and Ames Avenue in Omaha and are a part of what used to be a grocery store. Caeli leased the premises to Firestone for a term of 20 years beginning August 1, 1968, with

four 5-year extension options. The lease provides that Firestone would use the premises

> for the principal purpose of conducting a business for the sale and installation of tires, oil, and any and all home and automobile supplies and furnishings, toys, gardening and recreational goods, tire repairing, vulcanizing, and for general automotive service station, for a general retail business similar to that conducted on a national scale by other stores (which shall primarily engage in the business defined in this Section 6) of TENANT, and for such other uses as may be incidental thereto, including, without limitation, incidental wholesale sales, and for no other purpose or purposes.

Before Firestone took occupancy of the premises, Caeli, pursuant to agreement, made several improvements in order to house the Firestone business. The premises were expanded, and part of the former grocery store was remodeled into a showroom. Along with other modifications to the building, many electrical outlets and a platform were added to the retail sales area, and a wheel alignment pit was installed, along with a vent for an underground oil storage tank.

Caeli first urges that Firestone breached the lease by defeating the percentage rental provision of the lease. Section 7 of the lease provides for a base rental of $16,800 per year, or $1,400 per month. Section 8 of the lease provides for a contingent additional rental in the amount the sum of 3 1/2 percent of Firestone's annual net retail sales plus 1 percent each of any annual net commercial and wholesale sales exceeds the total of the minimum guaranteed rental plus certain tax reimbursements made by Firestone. Caeli acknowledges by the terms of said section that Firestone "made no representation of any kind as to minimum or maximum annual volume of retail, commercial, and wholesale sales which [it] may or shall make [in] any lease year during the term of this lease."

Caeli asserts that Firestone misrepresented the profits it would realize, that Caeli relied upon those misrepresentations, and that, indeed, Firestone deliberately kept its sales low in order to prevent triggering the contingent percentage rental provisions of the lease. The first assignment of error fails not

only because Caeli did not plead a fraud action, but because there is no evidence that Firestone engaged in such a bizarre business practice as refusing to make sales simply because its landlord would share in the increased profits such sales would produce. While it is true that Firestone removed itself from the appliance business throughout the nation, it does not follow, and the record does not establish, that such action was taken to deliberately keep from paying Caeli any additional rent.

Caeli next claims the trial judge erred in failing to find Firestone breached the lease by rendering the building unsafe in violation of the requirements of section 17 of the lease. That section provides in part that Firestone "shall comply with all ordinances and regulations of government authorities relating to keeping the premises in an orderly condition and relating to the method of conducting [its] business thereon."

Firestone installed a wheel alignment computer by welding it to some joists. It also installed an engine analyzer by drilling holes through some of the joists. Caeli's expert witness concluded that as the result of those installations the entire roof assembly had been weakened to the point that it was in danger of collapse. On the other hand, Firestone's expert testified that although there could be a slight overstress of the roof structure when under a live load, the roof so stressed was still within the required safety range and that the installation of the units in question had not caused any structural damage to the building.

In an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence; rather, we presume that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party. *Washington Heights Co. v. Frazier, ante* p. 127, 409 N.W.2d 612 (1987). Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside on appeal to this court unless they are clearly wrong. *Washington Heights Co. v. Frazier, supra.* Thus, under the state of the evidence it cannot be said the trial judge was clearly wrong in finding that Firestone had not rendered the demised premises unsafe.

The third assignment of error rests on section 21 of the lease,

which provides in part that any alterations made to the premises by Firestone must not "diminish the value of the then existing improvements." Caeli's representative testified that without the Firestone lease the premises would have a value of $840,000; however, because Firestone produces limited income, the lease reduces the value of the demised premises to between $250,000 and $275,000. Caeli also claimed that Firestone's removal of the wheel alignment pit and replacing it with other, more modern equipment reduced the value of the premises. That evidence falls short of the proof required by the lease, as the reduction in value is tied, at least in part, to the income produced by the lease rather than to alterations made by Firestone. Additionally, another witness testified that the alterations made by Firestone had no effect on the value of the premises; that in fact, depending upon the subsequent use made of the premises, removal of the wheel alignment pit could increase the value of the premises. On that state of the record it cannot be said the trial judge was clearly wrong in finding that there had been no diminution in the value of the premises as a result of Firestone's conduct.

The fourth assignment of error urges the trial judge erred in failing to find that Firestone breached the lease by making certain unauthorized alterations and by engaging in other prohibited conduct.

The first claim again rests on section 21 of the lease, which empowers Firestone to, at its expense, make alterations to the interior of the building as, in Firestone's opinion, may be reasonably necessary or desirable, provided that it obtain Caeli's approval, which approval Caeli may not unreasonably withhold.

Caeli complains that Firestone, without Caeli's permission, replaced the underground oil storage tank located outside the building in such a way as to permit water to accumulate around the tank and seep onto and damage the footings, erected a partition which increased Firestone's warehouse space and decreased its retail sales area, and spent $9,200 in remodeling and repainting portions of the demised premises.

Caeli also asserts that Firestone erected and removed certain signs without Caeli's permission in violation of section 16 of the

lease, which provides that Firestone

> may erect such signs, with right of repairing and replacing when necessary, as shown on attached Exhibits. Said signs shall conform to city ordinances or the requirements of any other governmental authority having jurisdiction. [Firestone] may also erect such other signs as it may desire from time to time provided [Caeli's] prior written consent shall be first obtained, which consent shall not be unreasonably withheld.

Caeli claims that two signs were removed and one installed without permission and that damage was done to the roof in the process.

A witness called by Firestone testified that there were no cracks in the building, and, thus, the trial judge could find that the footings had not been damaged. While there was evidence that Caeli repaired the roof on more than one occasion upon Firestone's request, there is no direct evidence that the repairs were necessitated by the placement or removal of signs. Neither does the evidence provide any basis on which Caeli could reasonably have withheld its approval to the remodeling and repainting done by Firestone.

Caeli also complains that Firestone failed to pay a $461 charge for parking lot repair. The evidence does not establish that Firestone has any legal obligation to pay for the parking lot repair, notwithstanding the fact that it had voluntarily paid similar such charges in the past.

Once again, we cannot say the trial judge was clearly wrong in finding that Caeli's claims, even if considered proved, did not constitute material breaches of the lease.

Since the first four assignments of error are without merit, it necessarily follows that the fifth assignment is also meritless. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract. See *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975). The lease in question contains no provision for a forfeiture under the circumstances proved.

The judgment of the district court is affirmed.

AFFIRMED.

WILLIAM R. ERNEST, APPELLANT, V. HOLLY JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.

415 N.W.2d 121

Filed November 6, 1987. No. 86-058.

Implied Consent: Licenses and Permits: Revocation: Jurisdiction: Time. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

On June 7, 1985, plaintiff-appellant, William R. Ernest, filed a petition in the district court for Lancaster County, seeking the vacating of an order of the director of the Department of Motor Vehicles, rendered on May 23, 1985, suspending plaintiff's driver's license for 1 year. The director's order was based on plaintiff's failure to comply with the provisions of the "Nebraska Implied Consent Law," referred to by the director as "LB 1095, passed by the 82nd Session of the Nebraska Legislature," and codified in Neb. Rev. Stat. §§ 39-669.08, 39-669.09, and 39-669.14 to 39-669.18 (Reissue 1984) as of the date of this incident. Plaintiff's petition alleges that he appealed from the director's order "under the provisions of §60-420 and §84-917(2) R.R.S. (1943)." On the same day a $200 certified check was filed with the department "to be applied as costs for the appeal . . . pursuant to the provisions of R.R.S. §60-420." Service of summons on the petition was made on June 11, 1985.

On June 10, 1985, a document entitled "Demand for Production" was filed by plaintiff in the case. This filing set out: "Plaintiff hereby demands production of all depositions or exhibits introduced in the Agency Hearing on April 11, 1985."

The record next shows that on September 3, defendants filed a demurrer to plaintiff's petition, alleging that the district court lacked jurisdiction of the appeal because "no transcript of the proceedings before the Director of the Department of Motor Vehicles has been filed by the plaintiff as is required by Neb. Rev. Stat. §60-420 (Reissue 1984)."

On September 30, 1985, plaintiff filed in the case "a copy of the transcript of proceedings before the Director of the Department of Motor Vehicles as required by Neb. Rev. Stat. §60-420 (Reissue 1984)."

A hearing was held on defendants' demurrer on October 11, and on November 8, 1985, the demurrer was sustained. Plaintiff then retained present counsel, who filed a motion for new trial on November 18, 1985. This motion for new trial was overruled, and plaintiff timely appealed to this court.

Plaintiff alleges and argues that the district court erred (1) in holding that "the failure to file the transcript prior to answer day was jurisdictional" and (2) in "failing to find that the appellant was entitled to effective assistance of counsel, and due process of law as guaranteed by the United States Constitution and the Constitution of the State of Nebraska in his appeal from the order revoking his driving privileges."

With regard to the second assignment, we have held that an individual has no constitutional right to effective assistance of counsel in a civil proceeding. *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979). Proceedings under the implied consent laws are civil in nature. The second assignment of error is without merit.

With regard to the first assignment, plaintiff alleged in his petition that he appealed from the director's order of suspension "under the provisions of §60-420 and §84-917(2) R.R.S. 1943." Section 39-669.18 provides that in appeals from the director's order of revocation, the person "who feels himself aggrieved because of such revocation may appeal therefrom . . . in the manner prescribed in section 60-420." Neb. Rev. Stat.

§ 84-917(7) (Cum. Supp. 1984) provides: "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal." Section 39-669.18 prescribes Neb. Rev. Stat. § 60-420 (Reissue 1984) as the method of appeal in this case. Our consideration is therefore limited to § 60-420.

Section 60-420 provides in part, in setting out the appeal procedure, as follows:

> The applicant, licensee, or appellant shall, within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public Accounts. The bond shall be filed in the office of the director. In lieu of the bond, the sum of two hundred dollars in cash, certified check, or money order may be deposited at the office of the director. It shall be the duty of the director, on payment or tender of the cost of preparing the transcript at the rate of ten cents per hundred words, to prepare a complete transcript of the proceedings relating to the refusal to issue or to reinstate any license or relating to the proceedings concerning the suspension, cancellation, or revocation of the license complained of. The applicant or licensee shall file a petition in such district court within thirty days from the date of filing of the director's final order in the matter and shall file the transcript before answer day which shall be the same as provided under the code of civil procedure in section 25-821.

Neb. Rev. Stat. § 25-821 (Reissue 1985) provides: "The answer . . . of the defendant shall be filed within thirty days after service of the summons . . . ."

The appeal procedure set out in § 60-420, in summary, provides: (1) a bond for costs must be filed in the office of the director within 20 days of the director's order; (2) a petition must be filed in the district court within 30 days of the director's order; and (3) the transcript of "the proceedings relating to the . . . revocation of the license" shall be filed before answer day, which is 30 days after the service of summons.

In *Black v. State*, 218 Neb. 572, 358 N.W.2d 181 (1984), and

Bammer v. Jensen, 222 Neb. 400, 384 N.W.2d 263 (1986), we held the filing of a bond in the form and manner set out in § 60-420 was necessary to give the district court, and this court, subject matter jurisdiction over such an appeal. Similarly, in *Miller v. Sullivan*, 194 Neb. 127, 230 N.W.2d 226 (1975), we held that the filing of a petition in the district court within 30 days of the director's order is jurisdictional.

We have not, however, previously addressed the effect of the requirement of § 60-420 that the transcript shall be filed within 30 days after the service of summons on the petition on appeal.

Appellant compares the procedure as to appeals set out in § 84-917 with the procedures in § 60-420. Section 84-917(4) provides: "Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it . . . ." Based on comparing the two statutes, appellant contends it is unfair to consider the requirements of the filing of the transcript under § 60-420 jurisdictional, when we held in *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), that the filing of the transcript in appeals under § 84-917 was not jurisdictional. In *Maurer, supra* at 161, 328 N.W.2d at 749, we held, "The preparation and filing of the transcript under the Administrative Procedures Act, as opposed to error proceedings, while critical to the ultimate disposition of the case, is not jurisdictional." That holding was specifically limited to appeals under the Administrative Procedures Act and the court specifically noted that under § 84-917(4) the 15-day period of time could be extended by the court "for good cause shown." *Maurer, supra* at 162, 328 N.W.2d at 749. The idea of a possible extension of a filing time militates against such a time's being jurisdictional. No such possible extension of the filing time is contained within § 60-420.

In *Maurer*, we noted that in error proceedings under Neb. Rev. Stat. § 25-1905 (Reissue 1985), the filing of the transcript by the plaintiff was required and jurisdictional as determined in *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973). In *School Dist. No. 39 v. Farber*, 215 Neb. 791, 793, 341 N.W.2d 320, 322 (1983), we said that in a

proceeding under § 25-1905, "The requirement that a transcript of the proceedings in the lower tribunal be filed with the petition is mandatory and jurisdictional."

Appellant states: "For reasons which are not clear, the Nebraska Legislature has created varied and numerous procedures for seeking judicial review of essentially non-judicial tribunals." Brief for Appellant at 4. While that may be so, the fact remains that § 60-420 provides clearly that a person who wishes to appeal an order of the Director of Motor Vehicles "shall [among other things] file the transcript before answer day which shall be the same as provided . . . in section 25-821." That answer day in this case was July 11, 1985—30 days after service of summons. The transcript was filed on September 30, 1985.

As set out above, this court has held that in an appeal pursuant to § 60-420 the requirements of the statute that an appellant *shall* file a bond for costs in the office of the director and *shall* file a petition within 30 days of the order are mandatory and jurisdictional. We can see no difference in holding that the statute's requirement that the appellant *shall* file the transcript before answer day is also jurisdictional. The requirements as to the times of filing the petition and the transcript are in the same sentence. The language is clear and unambiguous, and we see no reason to depart from our previous holdings that "shall" means that a mandatory action must be accomplished. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982). We hold that the filing of the transcript of the proceeding relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in § 60-420, is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.

We note there is no question in this case of any failure on the part of the Department of Motor Vehicles to prepare the transcript. Section 60-420 provides: "It shall be the duty of the director, on payment or tender of the cost of preparing the transcript . . . to prepare a complete transcript . . . ." The record in this case does not show any payment or tender of costs.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissents.

IN RE INTEREST OF P.J.M., R.E.M., AND S.A.M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.M., APPELLANT, AND L.M., APPELLEE.

415 N.W.2d 124

Filed November 6, 1987. Nos. 86-858, 86-859, 86-860.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court's review is de novo on the record.
2. **Parental Rights.** The order terminating parental rights must be supported by clear and convincing evidence and must also be in the best interests of the child.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

C.E. Danley, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney, and Dennis A. Winkle, guardian ad litem, for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On May 8, 1986, the Gage County Court, sitting as a juvenile court, entered an order terminating the parental rights of R.M. and L.M. as to their children P.J.M., R.E.M., and S.A.M. Both parents appealed to the district court for Gage County. The district court affirmed the termination order. The father, R.M., appealed to this court, asserting only that the decision was not founded upon clear and convincing evidence. We affirm.

On February 2, 1982, the State filed petitions alleging that P.J.M., R.E.M., and S.A.M. were in a situation which was injurious to the health of such children by virtue of unsanitary living conditions. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984). The adjudication hearing was had on the matter on February 23, 1982. The parents admitted that they had no place to live at that time and consented to the children's being placed in temporary custody with the Gage County department of public welfare.

On April 13, 1982, the court entered an order of temporary

disposition under the following terms and conditions:

(1) That the parents attend counseling at Blue Valley Mental Health Center, Beatrice, Nebraska. Said counseling to include but not necessarily be limited to the following topics:

a. Parenting skills
b. Discipline and guidance of children
c. Coping with stress
d. Marital strife
e. Finances
f. Adult supervision of children

(2) That [R.M.] seek and maintain suitable employment and make no change in employment without permission of the Gage County Division of Public Welfare.

(3) That the parents obtain adequate housing in cooperation with the Beatrice Housing Authority and maintain suitable housekeeping standards as approved by the Gage County Division of Public Welfare.

(4) That the parents work with the Gage County Home Extension Aide in improving nutrition and meal planning and food budgeting.

(5) That the parents maintain contact with the Gage County Division of Public Welfare and agree to visitation from personnel associated with said agency.

This order was continued several times, and on November 29, 1983, the order was continued and modified as follows:

(6) account for all income and expenses to the State Department of social services.

(7) [R.M.] shall enroll and regularly attend the Nebraska Division of Rehabulation [sic] Services Program (Voc Rehab) and succssfully [sic] complete the same.

On November 26, 1985, the State of Nebraska and the guardian ad litem for the children filed motions to terminate the parental rights of both parents. A hearing was held on these motions, after which the judge entered the termination order. The court made specific findings as to each of the seven above-mentioned directions and concluded that, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984), reasonable efforts,

under the direction of the court, had failed to correct the conditions which originally necessitated the order. The court further found that it was in the best interests of the children that a final disposition terminating parental rights be made, since the parents had been unable, within a reasonable time, to rehabilitate themselves.

Our review of an order terminating parental rights is de novo on the record. *In re Interest of C.C., ante* p. 263, 411 N.W.2d 51 (1987). The order must be supported by clear and convincing evidence, and the court's primary consideration must be focused on the best interests of the child or children involved. *Id.*

The Nebraska Department of Social Services became involved with this situation in February of 1981 following a referral from the Beatrice Police Department which expressed concern about filthy home conditions and nutrition of the children in the home. During a visit to the home, a Child Protective Services worker with the department observed that the overall home conditions were very bad: the floors were dirty, so dirty that her shoes stuck to the floor in the kitchen; food was crusted on top of the stove and running down the side of the stove; and there was very little food in the refrigerator. The Child Protective Services worker continued to work with the mother and father for nearly a year, but the unsanitary conditions persisted. In January of 1982 a report was forwarded to the Gage County attorney's office, which led to the initial adjudication placing the children in foster care. When the children were placed into foster care in February, they were quite dirty and had head lice.

During the ensuing 4 years, the parents moved a number of times to different residences in the city of Beatrice. After each move, housekeeping standards would improve for a short period under the direction of social services workers, but, after a time, efforts to maintain sanitary conditions would fail.

Two children were born to the parents following the adjudication of P.J.M., R.E.M., and S.A.M. The parents were divorced in March of 1984, but were living together at the time of the termination hearing.

In April of 1985 the Nebraska Department of Social Services

contracted with a private agency, in a further attempt to reunify the family. A worker for this agency testified that from April through July she visited the mother two times a week and sometimes even more to help develop housekeeping, nutrition, and parenting skills. Despite these efforts, no appreciable progress was made with respect to housekeeping. The worker also testified as to the mother's inability to provide proper hygiene and nutrition care for her child then in the home. During her visits, the worker observed that the father never did anything to help with the maintenance of the home or care of the child.

From November of 1985 until the termination hearing the Department of Social Services again provided intensive counseling to the mother in the areas of nutrition, housekeeping, and child care practices. Once again these efforts proved fruitless. This worker testified that when the father was in the home, the mother was less willing to cooperate with her.

Despite repeated efforts on the part of social workers and repeated admonishments from the court, the parents were unwilling to attend counseling appointments at Blue Valley Mental Health on a regular basis. The mother testified that she "just got tired of [going]" to the counseling sessions, and added that she did not feel the counseling resulted in any progress. The father agreed with this testimony. Both parents testified that they were aware that the counseling was ordered by the court and attendance was a necessary step in getting their children back. There was also expert testimony from a psychologist that both parents had the intellectual capacity to understand and appreciate the court order.

At the time of the termination hearing the mother was unemployed, caring for the two children born since the court placed the first three children in foster care. The father has had occasional odd jobs, but has had no regular full-time employment since the adjudication. He also failed to complete the vocational rehabilitation program as ordered.

The father totally disregarded the court's order that he account for his income and expenses to the state Department of Social Services. His testimony regarding this issue reflects his

belligerent attitude with respect to the entire matter:

> Q- Okay. Now, at a later time the Court ordered you to report your earnings and make an accounting of your earnings to the Department of Social Services, Mrs. Church. Is that correct?
>
> A- Right.
>
> Q- Mrs. Church testified that you failed to do that. Is that correct?
>
> A- That's true.
>
> Q- What is the reason for that?
>
> A- Because the reason is I don't feel right that I have to show what I spend my money on and nobody else do, either.
>
> Q- You don't feel that showing an ability to budget and control your money would be important to show to the Court — in showing your fitness to have custody of your children back?
>
> A- I know what I spend my money on and I think it's my business what I spend my money on.
>
> Q- Okay. So in other words, you don't think the Court or the department has really any business sticking their nose into your finances. Is that right?
>
> A- Right.

It is evident from all of this that the father did little, if anything, to comply with the court order, and yet, it is he and he alone who is now appealing the termination order. The mother, who at least made some effort to rectify the situation, admitted at the termination hearing that she was then unable to care for the three children, given her present home situation with the other two children.

The three children have been in the same foster care home since the adjudication. When they were initially placed in foster care, they were behind in their developmental skills. Since then they have done quite well, but the youngest child, R.E.M., has had a severe speech problem which has required special attention on the part of the foster parents.

The juvenile court judge accurately summarized the situation:

> [A]fter four years of court-directed intervention including

> assistance from Social Services, counseling by mental health professionals, aid from the County Extension Service, and intensive in-house training by two separate private agencies, there is no realistic hope for returning the children to their parents within the foreseeable future. Put simply, the parents wish to maintain contact with their children, but are content to have them reared by the state.

Given the situation, the juvenile court's plan for parental rehabilitation was reasonable. The plan attempted to provide necessary instruction on housekeeping, nutrition, and care for the children, and also to provide at least the minimal amount of financial and emotional stability required to sustain a family unit.

We find clear and convincing evidence that R.M. failed to comply with this program as ordered and that the conditions leading to the adjudication have remained uncorrected. We have consistently held that when parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child or children require that parental rights be terminated without delay. *In re Interest of C.C., ante* p. 263, 411 N.W.2d 51 (1987); *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984). The 4 years that have expired since the original adjudication have been more than enough time for the parents to attempt rehabilitation. It is apparent that they have been unable to do so, and it is now in the best interests of the children for a final disposition of this case. We therefore affirm the district court's decision affirming the juvenile court's order terminating the parental rights of R.M. as to his children P.J.M., R.E.M., and S.A.M.

AFFIRMED.

IN RE INTEREST OF Z.R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.R.S., APPELLANT.

415 N.W.2d 128

Filed November 6, 1987. No. 87-057.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists.
3. _____. The primary consideration in a termination proceeding is the best interests of the child. This standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child.
4. **Parental Rights: Appeal and Error.** An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
5. **Parental Rights.** A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. The past is an indication of the future.
6. _____. When a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay.
7. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
8. **Appeal and Error.** Consideration of an issue in this court is limited to errors assigned and discussed.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Leo J. Eskey, for appellant.

Dean Skokan, Dodge County Attorney, and Joe Stecher, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

J.R.S. has appealed from the order of the county court

terminating her parental rights to her son.

On October 22, 1982, a petition was filed alleging that the appellant's son, who was born September 19, 1980, was a child as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982),

> whose parent, guardian or custodian neglects to provide proper or necessary subsistence, or other care necessary for the health, morals, or well-being of such juvenile or who is in a situation dangerous to life or limb or injurious to the health or morals of the juvenile.

At a detention hearing on October 26, 1982, the matter was continued to allow the appellant to enter inpatient treatment at the Hastings Regional Center. The care, custody, and control of the child remained with Dodge County social services for placement in the home of the appellant's mother. The court further ordered that the appellant, her mother, and the child were not to have contact with Deno McCracken, a friend of the appellant's.

On December 7, 1982, all parties involved agreed to a 5-month continuance. The State explained to the court that the juvenile petition had been filed because McCracken had been living with the appellant and that there was evidence that he had abused the child. McCracken at that time was incarcerated in the Dodge County jail, but was due to be released in 5 months. The continuance was allowed in order to determine whether any further problems would arise once McCracken was released.

On March 16, 1983, the court heard testimony from a social worker, who recommended that the child continue to live with his grandmother. The court agreed with this recommendation and also allowed the appellant to reside in the home with her son.

The hearing on the petition to declare the child to be a child within the meaning of § 43-247(3)(a) was held on April 6, 1983. The appellant testified that when her son was about 1 year old, McCracken had bitten him on the face, leaving a bruise. She testified that she, too, had bitten her son after he had bitten her. When questioned whether she thought it cruel to bite a 1-year-old child, she responded, "Not any crueler than him biting me." Testimony showed that both McCracken and the

appellant had a drinking problem, and the appellant testified that McCracken had beaten her while he was drunk. The appellant had recently served a 60-day jail sentence for violating the terms of her probation in a separate criminal matter. Under the terms of the probation order, she was to have no contact with McCracken, which she violated by sending letters to him in the Dodge County jail. The appellant testified that she would have no further contact with McCracken.

The child continued in the grandmother's care during the appellant's incarceration.

In the opinion of the grandmother, it was not in the child's best interest to have contact with McCracken. She became especially concerned for the child's well-being after seeing the appellant's black-and-blue face after she had been beaten by McCracken.

The court found by clear and convincing evidence that the child was a juvenile as described in § 43-247(3)(a), in that the appellant had neglected to provide proper care necessary for his health, morals, or well-being, and that at the time the petition was filed, he was in a situation injurious to his health and well-being. The court stated that it considered McCracken to be "a very violent person with some very dangerous characteristics." The court ordered the appellant not to have contact with McCracken, and allowed the child to remain in his grandmother's care. The court admonished the appellant that if she contacted McCracken, she had "better not even think about taking [her son], because you're placing him in a very dangerous situation." The appellant responded that she would not contact McCracken. Social services was directed to prepare a rehabilitation plan for the appellant.

An evaluation hearing was held on May 11, 1983. The court directed the appellant to comply with a rehabilitation plan, which required her to do the following:

1. Enroll in S.T.E.P. classes scheduled to begin in September 1983.
2. Attend a parent support group.
3. Participate in child development courses.
4. Facilitate the child's Head Start application.
5. Continue full-time parenting responsibility for the child,

and when working or attending class arrange for child care.

6. Attend programs on child abuse.

7. Obtain a GED.

8. Work with CETA and vocational rehabilitation in an attempt to further her education.

9. Find suitable employment.

10. Abstain from drug and alcohol usage and avoid associates by whom such usage is encouraged.

11. Develop a monthly budget.

The order also provided that the child remain in the custody of Dodge County social services for placement with the appellant, provided she continued to live at her parents' home.

A supplemental petition to terminate parental rights was filed on August 22, 1983. At a hearing held on October 5, 1983, the supplemental petition was read into the record.

The supplemental petition alleged that on or about August 3, 1983, the appellant had left her parents' residence, taking the child with her, in contravention of the May 11, 1983, order. At a later hearing the appellant admitted that she had taken her son to Omaha to live with Deno McCracken, which violated the April 6, 1983, order that had specifically provided that she have no contact with McCracken. The petition further alleged that under Neb. Rev. Stat. § 43-292(6) (Reissue 1984), grounds existed for termination of parental rights, due to the fact that the child had been found to be a juvenile within the meaning of § 43-247(3)(a) and that reasonable efforts under the direction of the court had failed to correct the conditions which led to that determination.

The appellant denied the allegations and asked that care of her son be returned to her mother. The court rejected that request and ordered that the child remain in foster care, with supervised visitation by the appellant.

On December 28, 1983, the State requested a continuance in order to give the appellant time to work on some short-term goals. Those goals included finding employment, signing up at the Nebraska Job Service, and getting on a waiting list for low-income housing. The trial court ordered that the appellant have unsupervised visitation and overnight visitation every other week.

The next hearing was held February 29, 1984, to determine the appellant's progress and to determine the child's best interests. The appellant testified that she had obtained part-time employment at a nursing home and wanted to work toward certification as a care staff member. She did not know how long it would take to become certified and said that she would not pursue the plan if a better paying job came along. Child Protective Services supervisor Connie DeBord testified that the appellant had been having overnight visitation every other week and a 2-hour visitation during the other week. She stated that there had been some problems with the visitations, in that the child was coming back to the foster home tired and worn out due to all the people and activity at the appellant's home, and that she needed to spend more time alone with the child.

At the conclusion of the hearing the court ordered that a family evaluation be conducted by Dr. Ann Taylor of Omaha to assess the strengths and weaknesses of the appellant's relationship with her son and that the appellant explore the possibility of entering the Child Saving Institute's single-parent program. A second rehabilitation plan incorporated in the court order provided that the appellant continue her employment, work toward certification as a care staff member, attend counseling with the child's therapist as recommended, establish an appropriate residence for herself and her son, abstain from drug and alcohol use, and have no contact with Deno McCracken.

The next hearing was on August 29, 1984. Child Protective Services supervisor Connie DeBord testified that none of the items on the rehabilitation plan adopted by the court at the previous hearing had been complied with and that no progress had been made. Overnight visitations were stopped when the appellant was arrested for DWI and possession of a controlled substance. However, those charges were dropped prior to the hearing. Overnight visits were also stopped because the child continued to come home very tired from his visits.

DeBord testified that the foster mother was concerned because after some of the visitations the child would masturbate and on one occasion had touched one of her sons on the

buttocks and anal area. This led to concerns about possible sexual abuse in the child's past, or during visitation.

The rehabilitation plan of February 29, 1984, required the appellant to continue employment and work toward certification as a care staff member. DeBord testified that the appellant had quit her job at the nursing home, then went to work at the Village Inn in March, but lost that job in April after she was arrested. She was not employed at the time of the hearing. The rehabilitation plan also required the appellant to visit with the child's therapist. DeBord testified that the appellant had made an appointment, but did not show up. The plan also called for the appellant to establish an appropriate residence for herself and the child. DeBord testified that the appellant had recently married, but the couple had not yet established their own residence. As to the child's progress, DeBord testified that he was doing very well in the foster home and had made good progress in the counseling sessions at the mental health clinic. The court continued the matter because it did not yet have the family assessment report from Dr. Taylor.

The next hearing was held on May 15, 1985, at which time the reports from Dr. Taylor had not yet been received.

The appellant testified that she had been employed for the past 9 months; that she had not used drugs or alcohol for the past 9 months; that she had rented a house in which she and her husband, R.S., lived; that she had not had contact with Deno McCracken; that she had not been to any counseling sessions since December; that she had not taken any parenting classes; and that she had not attended any programs on child abuse.

A protective services planning review report which was received indicated that the appellant continued to have supervised weekly visitations and that the child had bonded to his foster parents. Joyce Leedahl, who supervised the visits, reported that the child was always ready to return to his foster home and would remind Leedahl at the end of a visit that it was time for him to "go home" now.

The appellant requested additional visitation. The matter was continued in order to give the guardian ad litem time in which to make a recommendation as to whether an increase in visitation should be allowed. The court ordered that future

testing and evaluations should include R.S.

The next hearing was held on July 31, 1985. Child Protective Services caseworker Sharon Davis testified that the person who supervised the child's visits felt that the child was still afraid of R.S. Davis also testified that the appellant was still employed, but that she had missed two of the last four meetings with the child's therapist and that she had not become involved in the domestic abuse program. The appellant testified that she had stopped attending the required AA meetings, but that she was going to become involved in the domestic abuse programs and that she would begin attending a parenting class the following week.

The testimony indicated that R.S. had done little to facilitate any family progress.

The report from Dr. Taylor indicated that her evaluation of the child showed him to be very fearful of returning to his mother's home and that he seemed to have emerged from a background of emotional rejection. In her evaluation, Dr. Taylor indicated that R.S. believed it was not necessary for him to participate in the same rehabilitation steps as the appellant because no child was removed from him due to his parenting. R.S. did participate in an evaluation by the Pathfinder Alcohol-Drug Outpatient Clinic in Fremont, which concluded that R.S. was chemically dependent and at the crucial stage of alcoholism. The clinic recommended that, at a minimum, R.S. participate in its outpatient program, which R.S. refused to do. R.S. failed to undergo a psychological evaluation as previously ordered by the court, because he could not afford the test cost of $450. However, Davis testified that R.S. and the appellant had recently purchased a new console color television, cable installation, and new living room curtains and that "this amount would have added up to more than the evaluation itself." R.S. had also been ordered to attend AA meetings, which Davis testified he tried to do but could not find any that would fit into his work schedule.

Davis recommended that the child remain in his foster home with continued supervised visits. The guardian ad litem recommended that the court allow unsupervised daytime visits in the appellant's home or some public place on a trial basis. The

court agreed to unsupervised visitation on the condition that it be with the appellant only, and not with R.S. The court revised the rehabilitation plan to include a minimum of one AA meeting weekly, with a signed slip to verify attendance; participation in the domestic abuse program; and completion of a parenting class. In addition, both the appellant and R.S. were to abstain from alcohol and be subject to chemical testing at any time.

A supplemental petition to terminate parental rights was filed on June 13, 1986, and the hearing held on August 27, 1986. The testimony at the termination hearing will be discussed in conjunction with the appellant's assignments of error.

The first assignment is that the trial court erred in finding on April 6, 1983, that the child was a juvenile within the meaning of § 43-247(3)(a). The order finding that the child was a juvenile as described in the statute was an adjudication order, which was an appealable order. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985). In order to appeal from that order, a notice of appeal had to be filed within 30 days from the rendition of the judgment. Neb. Rev. Stat. § 24-541.02 (Reissue 1985). In the absence of an appeal from the adjudication of April 6, 1983, the order may not be reviewed after expiration of the 30-day appeal period. *In re Interest of L.D. et al., supra; In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983). The time in which to appeal from the adjudication expired in 1983.

The second assignment of error is that the trial court erred in finding that a clear preponderance of the evidence showed that the child was physically abused by McCracken, the live-in boyfriend. It is not clear from the December 19, 1986, termination order whether the court was merely restating the reason for the April 6, 1983, adjudication (that McCracken had abused the child) or whether it was making a new finding with regard to the termination order. If the court was restating the reason for its April 6, 1983, adjudication that the child was a child within the meaning of § 43-247(3)(a), then the issue is not reviewable for the reasons stated in regard to the first

assignment of error. If the court was making a new finding that the child had been abused by McCracken, the assignment of error must still fail because the record shows by a clear preponderance of the evidence such abuse. The appellant testified at the April 6, 1983, hearing that when the child was about 1 year old, McCracken bit him on the face hard enough to leave a bruise. The grandmother testified that "it was a pretty good size bite."

In the third and sixth assignments the appellant argues the trial court erred in finding that the evidence showed an ongoing pattern in the mother's lifestyle and an inability to protect the child from physically assaultive males, even though R.S. had been sentenced to prison. The appellant also alleges error in the court's finding that the appellant continues to depend on abusive males. At the time of the original petition, the appellant was living with Deno McCracken, who abused both her and the child. She had contact and later took the child to live with McCracken after the court had specifically warned her of the danger in which she would be placing the child. She then became involved with and married R.S., who also abused her. She testified that the abuse occurred over "[l]ittle things like not paying the rent on time or not making enough for his lunch." R.S. was diagnosed as an alcoholic, yet refused to address his problem.

At the termination hearing Dr. Ann Taylor testified that the child had a lot of fears and concerns in regard to R.S. and that those fears continued to exist. That R.S. was incarcerated subsequent to the termination hearing on first degree assault charges for a period of 5 to 12 years only suggests that the appellant may no longer be involved with R.S.; it does not suggest that she will not become involved with yet another assaultive male.

The appellant's fourth and fifth assignments of error are that the court erred in finding that numerous rehabilitation plans were not complied with by the appellant and R.S., and erred in finding that no rehabilitation plan had been substantially complied with by the appellant.

Although there are conflicts in the evidence, the testimony given at the termination hearing gives a broad overview of the

appellant's involvement with the court. It is necessary to examine the requirements of each rehabilitation plan separately to determine the appellant's level of compliance.

First Rehabilitation Plan—dated May 10, 1983, and incorporated into the court order of May 11, 1983.

Parenting goals:

1. Enroll in S.T.E.P. classes scheduled to begin in September 1983. The appellant did not comply. She instead took the child from her mother's home and went to Omaha to live with Deno McCracken, in flagrant violation of the court order.

2. Attend a parent support group on Tuesday mornings. The appellant testified she went "to some of them." Caseworker Connie DeBord testified that the appellant did not attend this program from December 1983 through March 1985, while DeBord was her caseworker.

3. Participate in child development courses offered through the social services department of Memorial Hospital of Dodge County. DeBord testified that the appellant failed to comply with this requirement while DeBord was her caseworker. The appellant testified that she went to two or three of the sessions but did not get anything out of them.

4. Facilitate the child's Head Start application. The appellant complied with this requirement.

5. Continue full-time parenting responsibility for the child. The appellant testified she did this. However, it was during this time (before the child was placed in foster care) that the appellant took him from her mother's home to Omaha and moved in with McCracken.

6. Attend programs on child abuse. DeBord testified there were no such programs available in Dodge County at that time.

Vocational goals:

1. Obtain her GED. The court received into evidence a letter dated May 13, 1983, which stated that the appellant had completed her GED work and requested payment from the court. It would appear the appellant had completed her GED before the rehabilitation plan, dated May 10, 1983, required it.

2. Work with CETA and vocational rehabilitation in an attempt to further her education. The appellant testified that she went to CETA and filled out an application, but did not

follow up on it.

3. Find suitable employment which would allow her to provide for herself and the child without the assistance of ADC. The appellant obtained employment at a nursing home in January 1984.

Personal goals:

1. Abstain from drug and alcohol usage and avoid associates by whom such usage is encouraged. The appellant testified that during this time she continued to drink approximately once a month but that she did not use drugs. She admitted that she associated with people by whom such usage was encouraged.

2. Develop a monthly budget. The appellant testified she had done this with caseworker Bonnie Shuman.

Second Rehabilitation Plan—dated February 29, 1984, and incorporated into the court order of the same date.

1. Continue employment.

2. Work toward certification as a care staff member. The appellant quit her job at the nursing home shortly after the formulation of this rehabilitation plan, thus making requirement No. 2 no longer applicable. She began working as a waitress in March 1984, but held the job for only 2 weeks. She was fired after failing to show up for work due to an arrest on April 12, 1984, for DWI, resisting arrest, possession of marijuana, driving with an expired license, and refusing to submit to a chemical test. The appellant surrendered her license for 1 year, and all charges were dismissed. The appellant remained unemployed until September 1984, when she began working at Happy Inn.

3. Attend counseling with the child's therapist as recommended. Jeannie Barmettler was the child's first therapist. Caseworker Connie DeBord testified that the appellant failed to attend a therapy session in June 1984 and that it was not until after the court hearing in August 1984 that she began to attend some of the sessions. She did not attend any more sessions after December 1984. The child's next therapist was Sue Roesch. It is not clear from the record how many times the appellant met with Roesch. The appellant did testify that she quit seeing Roesch in the beginning of 1986 because "she wouldn't give me any feedback or anything" and "she wasn't

offering any kind of help back." The child was also under the care of child psychiatrist Dr. Ann Taylor. Dr. Taylor testified that she saw the appellant approximately twice. The appellant testified that she saw Dr. Taylor three or four times, but quit going because "we didn't get along."

4. Establish an appropriate residence for herself and the child. The appellant lived with her mother until August 1984, when she married R.S. DeBord testified that the general physical condition of the residences in which the appellant lived were acceptable and that the decline in visitation was not due to the residence itself, but due to other problems. Specifically, she testified that any home in which R.S. lived would not be an acceptable home for the child. Dr. Taylor testified that the child had a lot of concerns and fears in regard to R.S. and that those fears continued to exist. The child expressed a fear of returning to his mother's home.

5. Abstain from drug and alcohol usage. The appellant was arrested on April 12, 1984, for, among other things, DWI and possession of marijuana. The appellant testified that she did keep drinking until August 1984.

6. Have no contact with Deno McCracken. The appellant testified that she had had no contact with McCracken. DeBord testified that the appellant did have contact with McCracken during a visit in the park with the child. Several men in a car drove up, at which time the appellant took the child and went over to the car. After the visitation, the child said that McCracken had been in the car.

7. The appellant had agreed to provide nutritious meals, adequate rest time, clean clothing, and necessary medical care during extended visitations with the child. DeBord testified that problems arose in regard to the child's coming home tired and upset after his overnight visits to his mother's house. She reported that the child stated that on one occasion his mother had been gone the whole night and that his grandmother took care of him. There were also allegations made that the appellant and her mother had been taking baths with the child. The appellant denied taking a bath with her son, but admitted that her mother had done so. It was at this time that DeBord and the foster parents became concerned about some sexual acting-out

behavior that the child displayed at the foster home after returning from visitations. On one occasion the child began touching and playing with his foster brother's buttocks and placed his finger into the foster brother's anus. Because of this and the appellant's arrest for DWI, the overnight visitations were discontinued.

Third Rehabilitation Plan—dated June 24, 1985, and incorporated into the court order of July 31, 1985.

1. Continue employment. The appellant continued to work at the Happy Inn until September 1985, and then went to work at Hinky Dinky. She quit working at Hinky Dinky in March 1986, and went back to work at the Happy Inn. She was fired from the Happy Inn in August 1986, and as of the time of the termination hearing was not employed.

2. Attend counseling with the child's therapist as recommended. As previously discussed under the second rehabilitation plan, the appellant did not comply.

3. Continue to keep a residence appropriate for herself and the child. The appellant continued to live with R.S. The appellant testified she had continued to live with him even though, in the course of the past 2 years, social services, Dr. Taylor, and her own attorneys told her that R.S. was a large obstacle to her regaining custody of the child. In December 1985, the child told Dr. Taylor that his mother had hit him with a closed fist on the top of his head and had left bruises.

4. Abstain from drug and alcohol usage and submit to alcohol or drug testing if required by law enforcement or social services. In April 1986, social services requested a drug testing of the appellant after a family support worker visiting the home reported that she thought she had smelled marijuana and that the appellant appeared somewhat incoherent. The test results indicated the appellant had used marijuana. The appellant admitted that she had smoked marijuana as recently as August 4, 1986. At the time of the hearing the appellant was incarcerated in the Dodge County jail on charges of conspiracy and delivery of a controlled substance. R.S. was charged with the same offenses, plus an assault charge. Detective Sergeant Tellatin of the Fremont Police Department testified that on August 22, 1986 (5 days prior to the hearing), in a search of the

appellant's residence, marijuana was seized; two bongs, estimated to have been used within a fairly short period of time, and a small pipe were also found. He also testified that there was evidence that alcohol had been consumed in the house, as indicated by empty beer cans and an empty whiskey bottle. The appellant denied having consumed any alcohol since August 1984 and said that the empty cans and bottle belonged to someone else.

5. Regularly attend AA meetings. Sharon Davis, who became the appellant's caseworker in March 1985, stated the only evidence she had that the appellant was attending AA meetings was some attendance slips signed by appellant's friend Donna Hansen. She asked the appellant from then on to have the designated person that normally confirms attendance at AA meetings sign her attendance slips. Davis never received any attendance slips after that. The appellant testified that she tried to go on Sunday nights "if I didn't have laundry or something to do . . . ."

6. Become involved in a domestic abuse program. The appellant became involved in the S.O.S. (Systems of Support) program in late 1985, for a period of 2 1/2 to 3 months. She told Davis that the group had stopped meeting for a time and when they resumed she did not join the new group. The appellant testified that she was not involved in any domestic abuse program at the time of the termination hearing, but had signed up to begin one the following month.

7. Attend a parenting class. The appellant did attend the S.T.E.P. course and successfully completed it.

The record shows that over a period of 3 years the appellant has demonstrated her unwillingness to substantially comply with the requirements of her rehabilitation plans. As this court has stated:

> "As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation

> must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. In cases such as this the past is an indication of the future."

In re Interest of J. W., 224 Neb. 897, 903, 402 N.W.2d 671, 675 (1987), quoting from *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

The appellant's attendance at recent parenting and support groups is laudable, but it is too little, too late. She was ordered to begin those classes in September 1983. The above review of her compliance with the rehabilitation plans shows a definite and distinct unwillingness to comply with the plans, which were formulated for the purpose of changing the conditions in her home and life so as to allow her to regain custody of her son.

The sixth assignment of error is that the court erred in finding that the appellant has continued to abuse drugs.

The appellant has been arrested twice on alcohol- and drug-related charges since the trial court took jurisdiction of the case. Her first arrest was on April 12, 1984, for DWI, resisting arrest, possession of marijuana, driving with an expired license, and refusing to submit to a chemical test. While the exact connection between the two is not clear from the record, it appears that the charges were dismissed after the appellant surrendered her driver's license for 1 year. During April of 1986 she was required by social services to submit to a drug test after a caseworker smelled what she thought to be marijuana in the appellant's home. The test results indicated that the appellant had recently smoked marijuana.

In August 1986, she was arrested for conspiracy and delivery of a controlled substance. Evidence was received by the court subsequent to the termination hearing indicating that these charges had been dismissed. The appellant admitted that she had used marijuana as recently as August 4, 1986. The court did not err in finding that the appellant continued to abuse drugs.

The seventh and eighth assignments of error allege that the court erred in finding that conditions existed for the termination of parental rights as provided in § 43-292. The court found that under § 43-292 termination of parental rights would be in the best interests of the child, and following the

determination that the child was a juvenile within the meaning of § 43-247(3)(a), reasonable efforts, under the direction of the court, had failed to correct the conditions leading to that determination.

> "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. . . ."

In re Interest of C.C., ante p. 263, 264, 411 N.W.2d 51, 53 (1987); *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987).

An order terminating parental rights must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists. However, the primary consideration in a termination proceeding is the best interests of the child. *In re Interest of K.L.N. and M.J.N., supra; In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). This standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child. *In re Interest of M.B., R.P., and J.P., supra.*

Dr. Ann Taylor testified that the child is a very bright but anxious child who worries a lot, and because of this, stability is very important for him. When he is uncertain or unclear about things, he becomes extremely anxious and gets overwhelmed with his feelings, and cannot handle things until he knows clearly what will be happening to him. Because of this anxiety, a stable environment is very important to him. Dr. Taylor further testified that the child requires an environment that is structured, consistent, and predictable. His anxiety is in part due to his high level of intelligence, which was tested and showed an IQ of 136, putting him in the 99th percentile intellectually. Because of his intelligence, Dr. Taylor testified, "He's more aware of what is going to happen to him if things are not handled correctly . . . ."

Since she began seeing the child, Dr. Taylor has noted an

improvement in his verbalization of feelings, a better ability to express his anxieties, much improved motor skills, and an improvement in his overall functioning. She noted that as long as the child is in a stable environment where he feels safe, his school tasks are adequately attended to, and his needs are adequately met, he can become a very functional adult. Dr. Taylor testified that as to his need for stability, it would be in his best interests to terminate parental rights. The evidence supports a finding that termination of the appellant's parental rights is in the child's best interests.

The appellant also alleges error in the trial court's finding that, under § 43-292(6), reasonable efforts had failed to correct the conditions leading to the determination that the child was a juvenile within the meaning of § 43-247. At the time of the termination hearing, the appellant was unemployed, in jail, living with a man who beat her, showed no sign of discontinuing drug use over the 3 years, and showed little effort to cooperate with the child's therapists. When a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay. *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). As this court has often stated, a child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of R.A., ante* p. 160, 410 N.W.2d 110 (1987); *In re Interest of K.L.N. and M.J.N., supra; In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

The evidence supporting the termination is clear and convincing, and the judgment should be affirmed.

The appellant's ninth assignment of error is that the lower court committed error throughout the proceedings in the reception of evidence, which deprived the appellant of a fair trial. Nowhere in appellant's brief is this issue discussed. Consideration of an issue in this court is limited to errors assigned and discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY J. HINTON, APPELLANT.

415 N.W.2d 138

Filed November 6, 1987. No. 87-123.

1. **Wiretaps: Appeal and Error.** The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
2. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
3. **Wiretaps: Probable Cause.** An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
4. _____: _____. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
5. **Wiretaps: Controlled Substances: Affidavits.** Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
6. **Wiretaps.** Substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights.
7. **Search and Seizure: Search Warrants.** In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
8. _____: _____. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and Lynne Fritz, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Following a bench trial, defendant, Larry J. Hinton, was adjudged guilty of possessing cocaine, a controlled substance, with the intent to deliver same, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). The district court subsequently determined that the offense constituted a Class II felony under the provisions of § 28-416(2) and Neb. Rev. Stat. § 28-405 (Reissue 1985), and sentenced Hinton to imprisonment for a period of 10 to 15 years. Hinton appeals and assigns as errors the district court's failure to suppress the evidence obtained as the result of (1) attaching a pen register on his residence telephone, (2) intercepting his telephone communications, (3) searching a package found in his vehicle, and (4) searching his residence. We affirm.

FACTS

Based on information derived from a narcotics purchase made by an undercover police officer, and corroborating information received from a confidential source, officers of the Omaha Police Division, on September 20, 1985, filed a combined application and affidavit in the county court for Douglas County seeking a search warrant which would permit the installation of a pen register on the telephone serving Hinton's residence. A pen register is a device which prints the numbers dialed from the telephone line on which it is installed, and further reflects that incoming calls were received, but does not reveal the sources of the incoming calls. The requested warrant was issued as ordered by the county court on September 20, 1985, and a pen register installed on September 23, 1985. This pen register warrant was returned within 10 days of its issuance. The application did not seek to limit the time within which the pen register might be used, and the warrant imposed no such time limit.

The pen register recorded the telephone numbers called from Hinton's residence from the day it was installed until Hinton's arrest on March 21, 1986, a total of almost 6 months. No amended search warrant covering use of this pen register was requested or issued when Hinton changed his home telephone number on or about February 24, 1986; the register simply continued to operate on the new number.

On February 5, 1986, based in part upon information gathered from the pen register and in larger part upon extensive additional investigation, the Douglas County attorney filed a 37-page combined application and affidavit in the district court for Douglas County, seeking permission to intercept conversations conducted over Hinton's residence telephone which would reveal, according to paragraph 62 of the aforesaid document, the following information concerning the illegal distribution of controlled substances:

> A. The identity of individuals as yet unknown who are involved in these offenses and the extent of their involvement.
>
> B. The details of carrying out the offenses listed below:
>
> 1. The times when these illegal transactions will occur or have occurred.
>
> 2. The location of specific illegal narcotics.
>
> 3. The identity of the source or sources of supply of the illegal narcotics and the extent of the source(s) [sic] involvement.
>
> 4. The manner in which monies derived from the illegal narcotics transactions were utilized, concealed, "laundered", or otherwise disposed.
>
> 5. The arrangement and verification of meetings between individuals involved in the aforementioned offenses.

The district court, finding that "normal police investigative methods have been attempted and failed and reasonably appear [likely] to fail to succeed in the future," granted the application on February 19, 1986, and ordered

> intercept[ion of] the wire or oral communications of Larry Hinton . . . over [Hinton's then residence telephone number] . . . for a period of thirty (30) days from the date of the actual physical hook-up, and shall not automatically terminate when the described communications have first been obtained, but will terminate upon attainment of the authorized objectives as outlined in paragraph 62 of the application and affidavit.

The court further ordered "interim reports every ten (10) days from the date of the actual physical hook-up, setting forth the

number of calls intercepted . . . and the nature of the calls."

Hinton's telephone was tapped, pursuant to this order, on February 19, 1986. Conversations monitored on February 20 and 21, 1986, revealed, among other things, that Hinton intended to change his telephone number; consequently, the county attorney filed an amended combined application and affidavit with the district court. This document repeated the assertions of the first application and affidavit in that court, added assertions informing the district court of the pending change in Hinton's telephone number, and requested authorization to intercept conversations carried over the new number. The district court, again finding that "normal police investigative methods have been attempted and failed and reasonably appear [likely] to fail to succeed in the future," granted the relief sought in the amended application on February 24, 1986, and authorized the interception of conversations over Hinton's new telephone number for 25 days, again ordering the filing of interim reports every 10 days while the tap continued.

Conversations monitored pursuant to these two wiretap orders suggested that Hinton was using his telephone to arrange the shipment of substantial amounts of cocaine via a commercial package carrier from a New York address to the Omaha area, and was paying for the cocaine by shipping cash to New York via the same carrier. On March 3, 1986, the police officers monitoring the conversations overheard Hinton tell his suspected New York cocaine source that Hinton would ship out a quantity of money the following day. On this basis the officers, on March 4, 1986, requested a warrant to search a package Hinton had delivered to the carrier for shipment. An order of the county court granting this money shipment search warrant was issued on March 4. The package was searched pursuant to this warrant at the carrier's Omaha terminal on March 4 and found to contain $22,500. The package was then resealed and allowed to continue on to its destination in New York. The county court had ordered return of this money shipment search warrant within 10 days of issuance; however, it was not returned until May 30, 1986, more than 12 weeks after issuance.

Subsequently, another telephone call between Hinton and the suspected New York source was monitored by the police on March 14, 1986; this conversation also indicated that Hinton would be shipping a quantity of cash to the suspected source, via the carrier, in prepayment for a drug shipment. A search warrant for this second shipment of money was requested from the county court, and an order granting the request was issued on March 14, 1986. This second money shipment search warrant was executed the same day it was issued, and the package was searched at the carrier's Omaha terminal. It was found to contain $19,000. The package was then resealed and allowed to continue on to its destination in New York. The county court ordered return of the second money shipment search warrant within 10 days of issuance; however, it was not returned until May 30, 1986, 11 weeks after issuance.

On March 14, 1986, the monitored conversation revealed that Hinton's suspected New York source intended to personally deliver Hinton a supply of cocaine a few days later. However, on March 17 the police intercepted a telephone conversation in which Hinton's live-in girlfriend warned this suspected source to delay the trip. On the basis of this information and the results of surreptitious observation of Hinton, the county attorney, on March 20, 1986, requested from the district court an extension of the authorization to tap Hinton's new telephone number, and that the order of extension, should one issue, require "interim reports every ten (10) days from [March 20, 1986]."

The district court, finding that the objectives of the initial and amended applications and orders were yet to be fully met and that "normal police investigative methods have been attempted and failed, and reasonably appear [likely] to fail to succeed in the future," granted the extension on March 20, 1986, to continue the tap on Hinton's new telephone number for 30 days from the date of issuance, and ordered the county attorney to file interim reports every 10 days through that period.

On March 20, 1986, officers monitoring the telephone overheard a conversation between Hinton and his suspected source to the effect that three packages had been shipped to

Hinton via the carrier and should arrive shortly. The following day, March 21, 1986, the police verified that a package addressed to Hinton from one of the New York addresses used by the suspected source had arrived at the carrier's Omaha terminal. At approximately 9:30 that morning, officers monitoring Hinton's telephone conversations overheard him call the carrier's Omaha terminal, verify the arrival of the package, and inquire if one John Gallion, a known Hinton confederate, might pick up the package on Hinton's behalf; the carrier's officials assured Hinton this would be acceptable.

Shortly thereafter, the police and agents of the Federal Bureau of Investigation saw Hinton and Gallion leave Hinton's apartment, enter Gallion's automobile, and drive to the carrier's terminal. The officers then observed Gallion enter the carrier's terminal while Hinton remained in the automobile. Gallion returned to the automobile 2 to 3 minutes later, carrying a package measuring approximately 18 inches by 12 inches by 3 inches. Hinton and Gallion then drove off. Although they had no arrest warrant, the police and FBI agents followed and placed both Hinton and Gallion under arrest.

At this time a police officer "reached in . . . through the open driver's door and took the package from between the front seats." The officer carried the package to the Omaha Police Division Central Station, keeping it in his possession until a combined application and affidavit for a search warrant and the warrant were prepared, issued, and executed, all of which occurred during the day of Hinton's arrest. The county court ordered return of this automobile package search warrant within 10 days of its issuance; the warrant was instead returned to the county court on May 29, 1986, nearly 10 weeks after issuance. Field tests indicated that the package contained narcotic substances. Subsequent laboratory analysis determined the package contained 2¼ pounds of 99-percent-pure cocaine.

On the day of Hinton's arrest the police also filed a combined application and affidavit with the county court for a warrant to search Hinton's residence. This document recited information gleaned from the pen register, wiretaps, searches of the two packages of money Hinton had shipped to New York, the

surreptitious observation of Hinton, and confidential informants, all tending to support the affiant's stated belief that if a no-knock search of Hinton's residence was conducted, evidence of illegal drug transactions would be found. This application was granted by the county court on the day sought, and the warrant was issued and executed on that same day. The search conducted pursuant to this residence search warrant produced several dozen items of drug paraphernalia contaminated with a white powder residue suspected to have been cocaine. The results of the laboratory tests conducted on the residue are not reflected by the record. The county court ordered return of this residence search warrant within 10 days of its issuance; however, in typically slipshod fashion, this warrant was not returned until May 29, 1986, almost 10 weeks after its issuance.

On March 26, 1986, the district court, finding that the objectives of the wiretaps had been met and that the police had stopped intercepting telephone conversations as of 9:54 p.m. on March 21, 1986, ordered the existing wiretap terminated. Five months later, on August 20, 1986, the county attorney officially notified Hinton by letter of the placement of the taps. The letter was dated August 20 and postmarked August 22.

The prosecution failed to submit interim reports of the intercepted telephone conversations every 10 days, as had been ordered by the district court; in one instance an interim report apparently was submitted several days late, and a final interim report covering the period March 17, 1986, through the last intercepted call on March 21 was never filed. The record does contain three interim reports; one dated February 28, 1986 (covering the period February 19 through 24, 1986), one dated March 7, 1986 (covering the period February 24 through March 5, 1986), and one dated March 21, 1986 (covering the period March 6 through 16, 1986), respectively.

ANALYSIS

Intercepted Communications Statutes

We begin our analysis of the law applied to Hinton's assignments of error by reviewing the relevant provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp.

1986). In general, the statutes make it unlawful to, among other things, deliberately intercept or attempt to intercept, through any means, including through the use of any "electronic, mechanical, or other device," any wire or oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception. § 86-702 (Reissue 1981). The act permits prosecutors to apply to the district courts for authority to intercept wire or oral communications when such interception "may provide or has provided evidence" of, among other things, "dealing in narcotic or other dangerous drugs." § 86-703 (Reissue 1981).

Section 86-701(4) (Cum. Supp. 1986) defines electronic, mechanical, or other device as:

> any device or apparatus which can be used to intercept a wire or oral communication other than (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his or her duties; or (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

Other relevant definitions found in § 86-701 are:

> (1) Wire communication shall mean any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of communications;
>
> (2) Oral communication shall mean any oral communication uttered by a person exhibiting an expectation that such communication is not subject to

interception under circumstances justifying such expectation;

(3) Intercept shall mean the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

These definitions are virtually identical to those found in title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1982). While this court has not treated these definition sections specifically, it has observed that § 86-705 (Reissue 1981), dealing with the requisites for obtaining authority to intercept wire or oral communications and with the contents of orders granting such authority, and 18 U.S.C. § 2518 " 'are, in all substantive ways and in wording, virtually identical. . . .' " *State v. DiMauro and Kessler*, 205 Neb. 275, 278, 287 N.W.2d 74, 76 (1980); *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977). Consequently, this court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes. *State v. DiMauro and Kessler, supra; State v. Kolosseus, supra.*

Pen Register

Recognizing that the U.S. Supreme Court has concluded that a search warrant is not required prior to installation of a pen register, *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), and *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), Hinton tells us that the "[w]arrantless use of a pen register violates State Constitutions" and refers us to *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), and *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984). Brief for Appellant at 3. However, Hinton does not tell us what specific language of the Nebraska Constitution he claims requires a search warrant before a pen register may be used. The general rule is that this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). This court will not hunt through a constitution in an effort to find language which might arguably support a challenger's position, conceive and develop the arguments which specific and identified constitutional

provisions may suggest, and then sit in judgment of the validity of those arguments.

Accordingly, we do not concern ourselves with the validity of the pen register search warrant, should such a warrant have been required.

Interceptions

This then brings us to the second assignment of error, which claims that evidence of the intercepted telephone conversations should have been suppressed because the State lacked probable cause to tap Hinton's telephone, had not exhausted other investigative procedures, failed to make timely interim reports, and failed to provide a timely inventory of the interceptions.

Probable Cause

An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant. *United States v. Garcia,* 785 F.2d 214 (8th Cir. 1986), *cert. denied* 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342. The test for issuance of a wiretap warrant under 18 U.S.C. § 2518 is whether the sworn information before the court is of sufficient apparent reliability to justify a neutral judicial officer in finding that there is probable cause to believe that an offense has been or is being committed. *United States v. Abramson,* 553 F.2d 1164 (8th Cir. 1977), *cert. denied* 433 U.S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095. See, also, *United States v. Van Horn,* 579 F. Supp. 804 (D. Neb. 1984), *aff'd sub nom. United States v. Womochil,* 778 F.2d 1311 (8th Cir. 1985).

In the present case, the affidavit in support of the first wiretap application contained a 30-page factual recitation, derived through a 6-month investigation which employed confidential informants, surveillance of Hinton and his residence, controlled buys of narcotic substances by undercover officers, the use of the pen register, and examination of Hinton's telephone bills, all of which strongly indicated that Hinton was a significant supplier of cocaine to the Omaha area. Without reproducing that document in this opinion, the affidavit was sufficiently detailed and of sufficient apparent

reliability to warrant a finding by a neutral judge that there was probable cause to believe that an offense both had been and was being committed.

Other Investigative Procedures

Section 86-705(1) provides in part: "Each application shall include the following information: . . . (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Hinton argues:

> It is clear from the evidence introduced at the suppression hearing on August 25, 1986, that investigatory procedures employed by the Omaha Police Department and Douglas County Sheriff's Department had succeeded and, therefore, a wiretap order was not needed. The State's witnesses testified that they had sufficient grounds for issuing a search warrant for the apartment of Larry J. Hinton . . . prior to [the] February 19, 1986, wiretap order being issued. Since other investigatory procedures were successful the State has failed to comply with Neb. Rev. Stat. 86-705(C) (Reissue 1981).

Brief for Appellant at 12. Hinton's argument assumes that his arrest was the sole objective of the investigation of which these wiretap warrants were a part. However, as paragraph 62 of the State's applications for wiretaps clearly indicates, such was not the case. While it appears the police knew the identity of one of Hinton's sources, the police wanted to also learn, among other things, whether there were other sources, the extent of the involvement by others, and the manner in which Hinton used, concealed, "laundered," or otherwise disposed of the moneys produced by the illegal narcotics transactions in which he was thought to be engaged.

The record does not suggest that the police knew the answers to those additional questions, all of which were legitimate aspects of the investigation, at the time of the wiretap applications. Indeed, that these facts had not been determined after 6 months of increasingly intensive investigation of Hinton's affairs strongly supports the conclusion that

intercepting Hinton's telephone conversations was an appropriate step to take. Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation. *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985); *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983); *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981); *United States v. Garcia*, 785 F.2d 214 (8th Cir. 1986), *cert. denied* 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342.

Untimely Interim Reports

Section 86-705(7) provides:

> Whenever an order authorizing interception is entered pursuant to sections 86-701 to 86-707, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

The State, for reasons not disclosed by the record, chose to ignore the orders that it file reports at 10-day intervals, advising the district court of the number and nature of the calls intercepted. As noted earlier, no report was filed for the last 10 days the wiretap existed, and the reports for the remaining 26 days were late. Nonetheless, neither does the record reveal nor does Hinton claim that he was actually prejudiced by the State's failure to strictly comply with the reporting requirements of the wiretap orders. This jurisdiction is committed to the rule that substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights. *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984); *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972). Moreover, as observed in *State v. Kohout*, 198 Neb. 90, 251 N.W.2d 723 (1977), since requiring interim reports is not mandated by statute and rests within the discretion of the judge issuing wiretap orders, waiver of the

requirement or determination of the consequences of failing to follow the order in that regard also rests within that judge's discretion.

Untimely Inventory

The fact that substantial and not strict compliance with the relevant statutes is required disposes as well of Hinton's complaint that he was not, within 90 days after the termination order as required by § 86-705(9), provided an inventory of the order, the authorized periods of interception, and the fact that conversations were intercepted. As noted earlier, for reasons not disclosed by the record, no effort was made to comply with this order until 5 months after the interceptions were stopped.

The record does reflect, however, that an information was filed against Hinton on April 2, 1986, 12 days after his arrest; that he was arraigned and entered a plea of not guilty on April 10, 1986, on which date the court ordered mutual and reciprocal discovery pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1985); and that on July 14, 1986, Hinton filed numerous detailed motions to suppress evidence. As pointed out by the Attorney General, Hinton obviously had actual notice of the existence, as well as the substance, of the wiretaps before the 90-day statutory notice period expired. Under the circumstances Hinton suffered no prejudice by the State's failure to have strictly complied with the requirements of § 86-705(9).

Searches

The remaining two assignments of error, the failure to suppress the evidence obtained as a result of the searches incident to the automobile package and residence warrants, are so interwoven that they are discussed together.

It must be noted at the outset that although these last two assignments of error address only the automobile package and residence warrants, Hinton's argument goes as well to the money shipment warrants of March 4 and 14, 1986.

Hinton first argues that there was no probable cause to issue any of those warrants. However, this argument is resolved adversely to Hinton by our earlier dispositions of his first two assignments of error; once it is determined that there was no infirmity in the use of the pen register or wiretaps, there was

more than sufficient probable cause to issue the warrants in question.

Hinton next contends that the evidence seized pursuant to all four of the warrants should be suppressed because they were not returned within 10 days after their respective dates. Again, however, we have said that in the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant and, further, that a failure in the ministerial act of returning and filing a search warrant does not void the warrant. *State v. McCown*, 189 Neb. 495, 203 N.W.2d 445 (1973).

DECISION

There being no merit to Hinton's assignments of error, the judgment of the district court is affirmed.

CAVEAT

The application in this case of the principle that in the absence of demonstrated prejudice to a criminal defendant's substantive rights, substantial compliance with certain provisions of the intercepted communications statutes will suffice should not be read as a condonation by this court of the prosecutor's apparent indifference to the letter of the law. While limited and carefully controlled eavesdropping by government is regrettably necessary at this stage in our history, the practice is nonetheless a particularly rebarbative intrusion into the privacy that members of a free society are entitled to expect. It must be remembered that interceptions of suspected criminal telephone conversations result as well in at least some minimal interception of innocent conversations. Thus, simple professional pride should dictate scrupulous observance of the steps designed to protect the privacy of the citizens of this sovereign state. Additionally, it is inevitable that repeated lackadaisical prosecutory efforts, whether related to intercepted communications, return of warrants, or other aspects of criminal investigations, will in some future case prejudice a defendant's substantive rights and thereby succeed in destroying an otherwise valid conviction.

AFFIRMED.

SHANAHAN, J., dissenting.

With good reason, there is detectable uneasiness and, perhaps, apocalyptic apprehension in the majority's opinion. Since *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984), in which this court adopted the doctrine of "substantial compliance" to validate a wiretap despite police departure from requirements specified in wiretap statutes, the State has prevailed in every appeal to this court on the issue of police noncompliance with the statutory requirements for a wiretap—a batting average of 1.000, which would be an outstanding feat in the major leagues but is hardly a commendable indication of obedience to laws protecting the privacy of Nebraska citizens.

INDEPENDENT DETERMINATION

The majority has circumvented the question whether a pen register, in the absence of authorization by a valid warrant, violates a citizen's protection available under the Nebraska Constitution. While a court should not be asked to "hunt through a constitution in an effort to find language which might arguably support a challenger's position," location of the particular constitutional provision applicable in this case does not require some tiresome trek through the Nebraska Constitution, from article I, § 1 (a person's inalienable rights and a government from the consent of the governed), to article XVII, § 9 (Nebraska Constitution enrolled and deposited in the Secretary of State's office). The federal cases mentioned by the majority, namely, *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), and *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), involve a pen register in relation to the fourth amendment to the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ," while the cited cases from state courts, *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), and *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984), answered the pen register question in reference to respective state constitutions which provided protection against "unreasonable searches and

seizures." The constitutional quarry of the "hunt" in Hinton's case is found at Neb. Const. art. I, § 7: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause . . . ," which is the exact constitutional protection examined in the above-indicated cases, federal and state. Therefore, as the result of Hinton's unquestionable reference to Neb. Const. art. I, § 7, this court should have resolved the issue about the pen register which produced information effective in Hinton's conviction.

Without question, a state may impose higher standards governing police practices on the basis of *state* law, and may guard individual rights, including the right to be free from unreasonable searches and seizures, more fervently than the U.S. Supreme Court does under the federal Constitution. *Mills v. Rogers*, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). "[T]he substantive rights provided by the Federal Constitution define only a minimum," a floor rather than a ceiling. *Mills v. Rogers, supra* at 300. "The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1367 (1982). Although opinions from federal courts, deciding questions involving the U.S. Constitution as well as other federal law analogously applicable to questions of state law, may provide appropriate models for resolution of issues arising under state law, a state court should not automatically defer to federal decisions, but should critically examine federal decisions, make an independent analysis of state law issues to be resolved, and determine solutions under appropriate state law. See Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 Am. J. Crim. L. 109, 148 (1983).

PEN REGISTER

In *United States v. Caplan*, 255 F. Supp. 805, 807 (E.D. Mich. 1966), a pen register was characterized or described as

> a device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation.

In *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), a divided U.S. Supreme Court held that a pen register by a telephone company does not constitute a search, and the customer or subscriber assumed the risk of the company's disclosure to police, eliminating the expectation of privacy necessary for fourth amendment protection.

Criticizing the majority opinion in *Smith v. Maryland, supra*, LaFave makes the following observation:

> Under *Smith*, the police may without any cause whatsoever and for whatever purpose they choose uncover private relationships with impunity merely because the telephone company might under *some* circumstances for *certain limited purposes* make a record of such relationships for the company's *own* use. Indeed, it is enough for the majority in *Smith* that the telephone company has the capacity to make a record of such relationships, even though the company has had the good sense not to offend its subscribers by making or keeping those records for no reason.
>
> . . . .
>
> . . . [I]t makes no sense to say that the telephone subscriber (any more than the tenant or hotel occupant) is fair game for unrestrained police scrutiny merely because he has surrendered some degree of his privacy for a limited purpose to those with whom he is doing business. As

> Professor Amsterdam put it, "[t]he fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks." [Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 406 (1974).]

1 W. LaFave, Search and Seizure § 2.7(b) at 507-08 (2d ed. 1987).

In *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783, 791 (1984), the Pennsylvania Superior Court commented:

> If any law enforcement officer could, with or without probable cause or even reasonable suspicion, use a pen register on his own authority to record every number dialed by any citizen in Pennsylvania from a residential, business, or government phone, the pen register clearly could become a powerful weapon threatening invasion not only of the individual's intimate privacy, but also his political liberty, including his rights to associate, to express his views, and even to think in freedom.

Several state courts, construing their respective state constitutions, have concluded that a citizen has a right to be free from unreasonable search and seizure in the form of police installation or use of a pen register, obtained without a warrant issued on probable cause, to record telephone numbers dialed in privacy. See, *Com. v. Beauford, supra; People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (applied to toll billing records). In view of the vital role of telephonic communication in the private lives of Nebraska citizens, this court should have considered the constitutional question about police use of a pen register to obtain information otherwise beyond the control of the police, and should have required a warrant issued on probable cause as a condition precedent to acquisition of such pen register information.

WIRETAP

The notion that the standards imposed by *state* law may be more restrictive than federal standards, and may exceed federal constitutional mandates or minimums, also applies to

requirements for a wiretap authorized under state law. See, *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983); J. Carr, The Law of Electronic Surveillance, *Enactment and Constitutionality of Title III* (2d ed. 1987).

The case now before this court further illustrates how the "substantial compliance" doctrine has encouraged, and will continue to encourage, police noncompliance with wiretap statutes and court orders for electronic surveillance by law enforcement personnel. In Hinton's case, police routinely filed tardy interim reports or, worse yet, filed none at all, notwithstanding the court order for interim reports every 10 days after installation of the wiretap; persisted in the sloppy practice of late returns on search warrants; and filed the statutorily required wiretap inventory some 2 months after the 90-day period specified by statute. See Neb. Rev. Stat. § 86-705(9) (Reissue 1981).

The majority of this court feels that, inasmuch as interim progress reports on a wiretap are not required by the wiretap statute, failure to file progress reports, ordered by the court which authorized the wiretap, may be excused as a form of discretionary afterthought on the part of the authorizing court. Although § 86-705(7) provides that a court *may* require progress reports, that statute also contains a mandatory directive: "Such reports *shall be made* at such intervals as the judge may require." (Emphasis supplied.) If a court decides that progress reports are necessary to judicially determine whether a wiretap's objective has been achieved, thereby minimizing the intrusive nature of a wiretap, and then orders such progress reports from the police, rendition of progress reports is mandatory. Interim progress reports, when ordered by a court, and a wiretap inventory were intended by the Legislature to be substantial parts of the Nebraska wiretap law. In the wiretap statutes, as legislated requirements for a valid wiretap, nothing indicates a formula or factors by which one statutory component is accorded significance and value greater than any other part of the statutory scheme for wiretaps. On what basis and by what method a court may pick and choose among the several parts of the wiretap scheme to evaluate and characterize one part as more or less substantial than another

and, consequently, arrive at "substantial compliance" remains unexplained. See *United States v. Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974) (Douglas, J., dissenting in part).

While this court's majority believes that presence or absence of actual prejudice to Hinton is a consideration in evaluating police failure to file interim progress reports, a paramount consideration is the judicial role in monitoring police conduct in a wiretap. As we expressed in *State v. Golter, supra*: "The bedrock of our wiretap law is stringent judicial monitoring of law enforcement agencies seeking to use and using electronic surveillance—an investigative technique highly intrusive upon the privacy of the citizenry." 216 Neb. at 41, 342 N.W.2d at 653. Continued condonation of prosecutory or police indifference to, or ignorance of, Nebraska wiretap statutes and court orders pertaining to wiretaps leaves little inducement for law enforcement to obey the law. The doctrine of substantial compliance with wiretap statutes makes obedience to the law neither a virtue nor a duty in law enforcement. More important, by the doctrine of substantial compliance, the judicial role as a neutral monitor of a wiretap is relinquished to law enforcement, and efficiency in law enforcement, unrestrained by constitutional safeguards for citizens, becomes an absolute end in itself. Requiring strict compliance with wiretap statutes, however, will allay the concern contained in the "caveat" found in the majority's opinion.

The present case demonstrates that the substantial compliance doctrine only lessens law enforcement's incentive to adhere to the requirements of wiretap statutes. Dissenting in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928), Justice Brandeis warned:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

It remains to be seen what respect for law emerges from breach of law by those charged with enforcing laws.

Although the Nebraska wiretap statutes, as written, may be constitutional, the substantial compliance doctrine charts a course for inevitable collision with the constitutional protection against unreasonable search and seizure. While recognizing that police have departed from requirements imposed by the Nebraska wiretap statutes, this court's majority supplies no discernible demarcation to separate tolerable substantial compliance from a constabulary's contemptuous non-compliance condoned by the courts, and leaves one wondering when there is substantial compliance or not. Requiring the government's strict statutory compliance in wiretaps is but a small token to be paid for protection of privacy, lest nibbling at the wiretap statutes whets an appetite to devour constitutional safeguards against unreasonable search and seizure.

WHITE, J., joins in this dissent.

ANTHONY GRINDLE, APPELLEE, V. CHRISTY R. GRINDLE, APPELLANT.
415 N.W.2d 150

Filed November 6, 1987. No. 87-131.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Margene M. Timm, for appellant.

E. Michael Slattery of Case, Reinsch & Slattery, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an appeal from a decree of dissolution of marriage entered by the district court for Otoe County, Nebraska. The district court retained legal custody of the two children of the parties and placed physical custody of the children with the husband. The wife appeals and assigns as error the district

court's judgment on custody of the children.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987). This standard of review applies equally to child custody determinations. See, *Gerber v. Gerber, supra; Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987); *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987); *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985).

The best interests of the children are the paramount consideration in determining who should have the care and custody of minor children on dissolution of a marriage. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

A district court may maintain legal custody, while awarding physical custody to a parent or other party. See Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986). See, also, *Peterson v. Peterson, supra.*

A basis for a district court's retention of legal custody of children involved in proceedings for dissolution of marriage has been discussed in *Bartlett v. Bartlett, supra*, which is applicable in the present appeal. After our de novo review of the record, we find no abuse of discretion on the part of the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN J. WARD, APPELLANT.

415 N.W.2d 151

Filed November 6, 1987. No. 87-511.

Homicide: Sentences. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Sentence vacated, and cause remanded for resentencing.

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Defendant, Kevin J. Ward, was adjudged guilty of second degree murder and ordered to "serve an indeterminate sentence of thirteen to sixteen years" at the Nebraska Penal and Correctional Complex. He appeals and assigns that sentence as error, which the State has confessed by filing a motion to correct the same.

Neb. Rev. Stat. § 28-304(2) (Reissue 1985) defines murder in the second degree as a Class IB felony. The penalty authorized by Neb. Rev. Stat. § 28-105 (Reissue 1985) for such a felony is "Maximum-life imprisonment Minimum-ten years imprisonment." We have therefore held that a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. *State v. Moss*, 219 Neb. 327, 363 N.W.2d 367 (1985); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974).

As the sentence imposed upon the defendant is clearly invalid, defendant's assignment of error is sustained.

Accordingly, the sentence is vacated and the cause remanded to the district court for resentencing.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLANT, V. RAY H. WARREN, APPELLEE.
415 N.W.2d 152

Filed November 6, 1987. No. 87-800.

1. **Appeal and Error.** The language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts.
2. **Search Warrants: Evidence.** Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed.

Ronald L. Staskiewicz, Douglas County Attorney, and Michael J. Haller, for appellant.

Mary K. Thielen of Taylor, Fabian, Thielen & Thielen, for appellee.

CAPORALE, J.

Defendant-appellee, Ray H. Warren, has been charged with the knowing or intentional possession of a controlled substance, cocaine, intending to deliver, distribute, or dispense same, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986). The district court sustained his motion to suppress and exclude from use against him all evidence seized pursuant to a certain search warrant. The State has appealed to a single judge of this court pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1985), claiming that the district court erroneously invalidated the entire search because the warrant impermissibly purported to authorize the search of unnamed and undescribed persons, as well as the designated premises and

persons who were named and described. For the reasons discussed in this opinion, the ruling of the district court is reversed.

Upon the application and affidavit of Omaha Police Officer Kevin T. Donlan, the county court issued a warrant which authorized the search of

> 1804 Dodge Street, Apt. #506, Omaha, Douglas County, Nebraska, a beige brick multi-story, multi-unit apartment complex known as the Logan Apartments, AND/OR the person of Raymond Haywood, black male, light skin, 5'9", 150 lbs., approximately 22 years old, [a named and described female], John and/or Jane Doe.

In executing the warrant, Officer Donlan and other members of the Omaha Police Division found only Warren and the named and described female at the designated premises. The officers searched Warren, the named and described female, and the designated premises. Among the items found at and seized from the premises were several packages suspected to contain drugs and several items suspected to be drug paraphernalia. Nothing was seized from either Warren or the named and described female.

At the suppression hearing Officer Donlan testified that Warren weighed "190 to 200 some [pounds]" and that he had not himself ever seen the person he wished to search before preparing the application and affidavit for the warrant.

Warren's motion was based on our holding in *State v. Pecha*, 225 Neb. 673, 407 N.W.2d 760 (1987). The defendant therein, who was adjudged guilty of knowingly or intentionally possessing a controlled substance, successfully challenged his conviction on the ground that the evidence used to convict him was obtained from the search of his person pursuant to a warrant which named and described him only as John Doe. In reversing the conviction we ruled that the evidence should have been suppressed. In so holding, we noted that the affidavit on the basis of which the warrant was issued did not show probable cause to search defendant, and we characterized the warrant as "an invalid general" one. *Id.* at 681, 407 N.W.2d at 765.

The State recognizes that, under *Pecha*, the portion of the warrant in this case purporting to authorize the search of John

or Jane Doe was invalid as leaving too much to the discretion of the searchers in executing the warrant. It contends, however, that the remainder of the warrant identified the persons and premises to be searched with the requisite particularity and that such remainder should thus have been severed from the invalid portion and the search of the premises held to have been valid. Warren counters that, under *Pecha*, a warrant purporting to authorize the search of persons the police cannot identify with particularity in advance is a general warrant and invalid on its face in its entirety.

It must be noted that the language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts. See *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908). Thus read, *Pecha* stands only for the proposition that the search of a John Doe for which no probable cause existed is invalid. It does not stand for the proposition that an otherwise valid search must be suppressed merely because the warrant also purported to authorize the search of persons unknown to the police and identified only as John or Jane Doe. Indeed, in *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), the search warrant specifically described the property defendant was convicted of stealing but also stated defendant had other stolen property of unknown description. In affirming the conviction against a challenge the warrant was an invalid general one, we said that absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant. For a recent application of *State v. Pecha, supra*, and the principle of severability, see the single-judge opinion in *State v. Smith, ante* p. 419, 411 N.W.2d 641 (1987).

The present case is factually distinguishable from *Pecha* in at least one crucially important respect: evidence was seized not from Warren himself, but from various locations within the designated premises. Thus, even if Warren's claim that he was improperly searched because he is not the Raymond Haywood named nor the male described in the warrant is accepted as true, it avails him nothing. This is so because, as the foregoing

analysis demonstrates, the portion of the warrant which validly authorizes a search of and seizure from the premises may be severed from any invalid portions of the warrant. Consequently, the evidence seized from the designated premises may be used against Warren.

The ruling of the district court is erroneous and is hereby reversed.

REVERSED.

IN RE ESTATE OF LOYD WEST, DECEASED. THEO LEWIS WEST, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOYD WEST, DECEASED, APPELLANT, V. DONNA KARNES, TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEE.

415 N.W.2d 769

Filed November 13, 1987. No. 85-822.

1. **Legislature: Taxation: Decedents' Estates.** Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
2. _____: _____: _____. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
3. _____: _____: _____. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an

unconstitutional delegation of legislative power.

4. **Constitutional Law: Standing.** For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
5. _____: _____. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
6. **Actions.** The province of a court is to decide real controversies and to determine rights actually controverted, and the judicial power does not extend to the determination of abstract questions.
7. **Motions to Vacate: Fraud: Equity.** For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
8. _____: _____: _____. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
9. _____: _____: _____. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
10. **Motions to Vacate: Fraud: Proof.** Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
11. **Motions to Vacate: Fraud: Appeal and Error.** Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and

allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.

12. **Fraud: Words and Phrases.** *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
13. **Motions to Vacate: Fraud.** As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
14. **Motions to Vacate: Fraud: Attorneys at Law.** Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
15. _____: _____: _____. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.

Appeal from the District Court for Knox County: RICHARD P. GARDEN, Judge. Affirmed.

Paul E. Galter and, on brief, Frank Roubicek, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

On petition by the Tax Commissioner of the State of Nebraska, and pursuant to Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), the county court for Knox County set aside its inheritance tax order entered in the probate proceedings for the estate of Loyd West, deceased. Theo Lewis West, as personal representative of the estate, appealed to the district court, which affirmed the county court's judgment setting aside the inheritance tax order. We affirm the district court's judgment.

DETERMINATION OF DEATH TAXES

On September 7, 1980, Loyd West, a resident of Knox County, died testate and had devised his estate to his surviving

widow, Theo Lewis West, and his four children. After issuance of "Letters of Personal Representative" to Theo, on May 8, 1981, in the county court, Theo filed an inventory which reflected that Loyd's gross estate, located entirely within Nebraska, had a value of $2,319,355 at the date of Loyd's death. Frank Roubicek was the attorney representing Theo as personal representative, while John Thomas was the county attorney for Knox County.

Applicable Death Tax Statutes. The rate of inheritance tax for a transfer to an immediate relative, such as a widow or child, is 1 percent of the clear market value of property in excess of $10,000 taken by such recipient; provided, the succession interest of the surviving spouse is exempt from inheritance tax. See Neb. Rev. Stat. § 77-2004 (Reissue 1986). Deductions for determination of the inheritance tax are itemized in Neb. Rev. Stat. § 77-2018.04 (Reissue 1986).

An additional death tax, namely, the Nebraska or state estate tax, is imposed under Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), which states in appropriate part:

> [I]n addition to the inheritance taxes imposed by the laws of the State of Nebraska, there is levied and imposed an estate or excise tax upon the transfer of the estate of every resident decedent and upon the value of any interest in Nebraska real estate of a nonresident decedent. The amount of such tax shall be the amount by which the maximum credit allowance upon the tax imposed by the Federal Revenue Act imposing such tax shall exceed the aggregate amount of all estate, inheritance, legacy, or succession taxes paid to any state or territory or the District of Columbia, or any possession of the United States, in respect of any property subject to such tax.

To compute the amount due the United States for the federal estate tax, I.R.C. § 2011 (1982), as a part of the "Federal Revenue Act" mentioned in § 77-2101.01, allows credit for state death taxes paid up to a maximum credit specified in the federal statute. Therefore, the Nebraska estate tax is computed by reference to, or designed to "pick up," the difference between the maximum credit allowance under the Federal Revenue Act and the amount actually paid as the Nebraska

inheritance tax.

Among other Nebraska statutes pertinent to inheritance tax are Neb. Rev. Stat. § 77-2018.03 (Reissue 1986), which provides in part:

> [N]otice served upon the county attorney shall constitute notice to the county and the State of Nebraska. It shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney. In so representing the county and the State of Nebraska, the county attorney is authorized, in addition to such other powers as he normally may exercise as attorney for the county, to enter into and bind the county and the State of Nebraska by stipulation as to any facts which could be presented by evidence to either the inheritance tax appraiser or the county court, and to waive service of notices upon him to show cause or of the time and place of hearing, and to enter a voluntary appearance in such proceeding, in behalf of the county and the State of Nebraska,

and Neb. Rev. Stat. § 77-2022 (Reissue 1986): "When the value of the property has been fixed, as provided in [statutes requiring that property subject to inheritance tax be appraised at fair market value], the county judge shall determine and assess the tax to which the same is liable."

Inheritance Tax Worksheet. On behalf of the personal representative, Roubicek prepared an "inheritance tax worksheet," which was tendered to county attorney Thomas. That worksheet recited that Loyd West's gross estate had a value of $2,319,355 (the same value reflected in the personal representative's inventory filed with the court), the widow's succession interest was valued at $1,069,744, and the net value of the West estate, subject to Nebraska inheritance tax, was $1,249,611 (gross estate less widow's succession interest; no itemized deductions were claimed on the worksheet). In the worksheet's section entitled "NEBRASKA INHERITANCE TAX COMPUTATION," there was only the notation "As per material filed," which was inserted before the last line of the computation section—"Nebraska inheritance tax balance due . . . $48,375.00." Roubicek signed the worksheet on

May 7, 1981, the same day that Thomas, as Knox County attorney and pursuant to Neb. Rev. Stat. § 77-2018.01 (Reissue 1986), signed the worksheet and its incorporated certificate: "I have examined the foregoing worksheet and have no objections thereto for inheritance tax purposes only."

The inheritance tax worksheet was filed in the county court on May 8. Neither Roubicek nor Thomas filed any material to substantiate, or show the method of computing, the $48,375 figure stated in the worksheet as the inheritance tax due from devisees in the West estate. On June 2, the Knox County treasurer issued a receipt for payment of $48,375 as "Inheritance tax Loyd West Estate," and, also on June 2, an associate county judge of Knox County signed a "CERTIFICATE EVIDENCING PAYMENT OF COUNTY INHERITANCE TAX" of $48,375 regarding "the inheritance tax levied by this Court against the estate of Loyd West on the 2 day of June 1981." (The record does not contain the June 2 order indicated in the associate county judge's certificate.)

Form 706N, a Nebraska estate tax return, was signed by Roubicek on June 3 and, in reference to the West estate, recited that there was a taxable estate of $1,249,611, a credit of $48,375 was taken for state death taxes (which had been claimed on the federal estate tax return for the West estate), and inheritance tax was paid in the amount of $48,375, the same amount taken as a credit against the federal estate tax. Certification from Knox County, attached to the West estate's form 706N, verified payment of the inheritance tax stated in the state estate tax return. The 706N for the West estate then stated that the estate tax due the State of Nebraska was "$0." (For the West estate, there would be no state estate tax if the correct amount of inheritance tax paid was the same as the credit allowed against the federal estate tax. See § 77-2101.01.) Based on the information contained in the state estate tax return (706N), the Nebraska Department of Revenue, on June 10, issued its "Certificate Evidencing Payment of Nebraska Estate Tax," which stated: "Amount of Nebraska Estate Tax Paid NO TAX DUE."

As a result of a hearing held on June 16, County Judge James J. Duggan entered a "FORMAL ORDER FOR COMPLETE

SETTLEMENT AFTER INFORMAL TESTATE PROCEEDING," which recited the court's finding: "Inheritance tax has been determined, paid, and proper receipts filed. Inheritance tax is hereby approved as completed in this case." The certificate from the Nebraska Department of Revenue ("NO TAX DUE") was filed in the county court on June 19.

According to the "Estate Tax Closing letter," issued by the district director of the Internal Revenue Service on October 28, 1981, the tentative federal estate tax for the West estate was $448,140, but, after credits, including the $48,375 credit for state death taxes, the net federal estate tax on the West estate was $357,265.

PROCEEDINGS TO SET ASIDE TAX ORDER

Pleadings and Motion. Section 25-2001(4) empowers a district court and county court, see Neb. Rev. Stat. § 24-528 (Reissue 1985), to vacate its judgment or order after the term at which such judgment or order was made, if there has been "fraud practiced by the successful party in obtaining the judgment or order." On November 4, 1983, the Nebraska Tax Commissioner filed a petition to vacate the Knox County Court's inheritance tax order entered on June 16, 1981. The Tax Commissioner alleged that, if properly computed, the inheritance tax payable to Knox County "should not have been in excess of about $8,000.00," whereas the inheritance tax collected by Knox County was $48,375 as the result of the worksheet signed by Roubicek and Thomas. The Tax Commissioner claimed that the "Inheritance Tax Worksheet was fraudulently prepared and executed with the express purpose and intention of grossly overstating the inheritance tax due Knox County, in order to eliminate the estate tax due the State of Nebraska . . . ." The Tax Commissioner also alleged:

> That said fraud and collusion first became known to the State of Nebraska and its officers and employees in September, 1983, after another similar attempt to eliminate the state estate tax was brought to the attention of the Attorney General in August, 1983; the Department of Revenue of the State of Nebraska then initiated an investigation of estates in Knox County, Nebraska, to discover whether similar practices had occurred in the

> past; that that investigation led to the discovery of the fraud and collusion in this estate; that the Tax Commissioner could not, in the exercise of reasonable diligence, have discovered said fraud and collusion before she did.

Bearing in mind that the property valuations for the West estate are not disputed for the purposes of the present appeal but are accepted as reflected on the inheritance tax worksheet in question, the value of the West gross estate is $2,319,355. From that gross estate, there are deducted $357,265 (federal estate tax paid), $1,069,744 (widow's succession interest; exempt), and $40,000 ($10,000 exemption for each of the four West children), or $1,467,009 as the total for the deduction and exemptions, which results in $852,346 as the net value of the West estate subject to the Nebraska inheritance tax at the rate of 1 percent, or an inheritance tax of $8,523. When the inheritance tax is subtracted from $48,375 (the credit allowed to determine the federal estate tax on the West estate), the remainder, $39,852, is the apparent state estate tax due the State of Nebraska, based on the figures reported on the inheritance tax worksheet.

In their amended answer, the devisees of Loyd West generally denied the Tax Commissioner's allegations and, as an affirmative defense, raised the statute of limitations prescribed by Neb. Rev. Stat. § 25-2008 (Reissue 1985), which, except in cases of persons under certain disabilities, provides in part: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in section 25-2001, subdivisions (4), (5) and (7), must be commenced within two years after the judgment was rendered or order made . . . ." After their answer, the West devisees filed a motion for summary judgment, asserting that the Nebraska estate tax, imposed under Neb. Rev. Stat. §§ 77-2101.01 et seq. (Reissue 1986), is unconstitutional. (The devisees' particular assertions of unconstitutionality are set forth and addressed later in this opinion.) The devisees also sought summary judgment, claiming that the 2-year statute of limitations found in § 25-2008 had run. The court overruled the motion for summary judgment.

Hearing on Motion to Vacate. County Judge James J. Duggan testified that he "look[ed] at" and "relied on the

inheritance tax worksheet" before he entered his order on June 16, 1981, approving the inheritance tax due on account of Loyd West's death. According to Judge Duggan, if the county attorney approves an inheritance tax worksheet, "I accept it [the worksheet]." If the county attorney does not approve the worksheet, a hearing would be held regarding the inheritance tax determination, although, after becoming a judge in 1977, Judge Duggan has never had to preside over a contested inheritance tax hearing.

Witnesses for the Nebraska Department of Revenue testified about the procedure followed when a Nebraska estate tax return, form 706N, is filed. Unless there is an extrinsic indication of some possible irregularity affecting an estate tax return, the department does not audit a 706N. Basically, then, the department's procedure consists of reference to federal estate tax tables to verify the amount of credit allowable as a result of the taxable estate reported on the federal estate tax return. After confirmation that the amount of the allowed federal estate tax credit claimed by an estate coincides with the amount of the credit shown on the 706N, the department then compares the inheritance tax paid, as reported in the 706N, with the certificate for inheritance tax payment, which has been issued by the collecting county and accompanies the 706N filed with the department. If the amount of the paid inheritance tax equals or exceeds the allowed credit used by the estate to determine its federal estate tax, the department issues its certificate that no Nebraska estate tax is due. However, if the amount of the credit claimed for the federal estate tax exceeds the Nebraska inheritance tax paid, the department issues its certificate reflecting payment of the Nebraska estate tax, if the correct payment of the state estate tax has accompanied the 706N, or issues a notice of the amount due on the Nebraska estate tax, if no payment or an insufficient payment has accompanied the 706N. The department is not supplied with information substantiating any computations for figures appearing on the 706N. The fact that the amount of the inheritance tax paid is equal to the federal credit for death taxes does not, by itself, indicate any irregularity concerning the 706N. Therefore, the department's standard procedure in

reviewing Nebraska estate tax returns does not include an audit or require an investigation or request for additional information concerning an estate. Such departmental procedure, as previously described, existed and was followed regarding the 706N filed by the West estate. Because no error or irregularity appeared on the face of the return filed for the West estate, the Department of Revenue issued its certificate that there was no Nebraska estate tax due from the West estate. Before August 1983, the department had no information about any irregularity involving the return filed for the West estate. However, in August 1983, as the result of information from external sources, the department commenced an investigation into several Nebraska estate tax returns for estates administered in Knox County, including the West estate.

At the hearing on the commissioner's petition, other evidence disclosed several instances where Roubicek had prepared inheritance tax worksheets containing an overstated inheritance tax and then sought approval of those worksheets through stipulations with county attorneys. A former county attorney of Antelope County, which is adjacent to Knox County, testified that he had disapproved a worksheet prepared by Roubicek because the inheritance tax was overstated in the worksheet. When the Antelope County attorney told Roubicek the reason for disapproval of the tendered worksheet, Roubicek responded that he "wondered what the Antelope County supervisors would think if they found out [the Antelope County attorney] was turning down $8,000 to the county," that is, rejection of the overstated inheritance tax. Regarding another estate which involved assets located in several counties, Roubicek wrote to the various county attorneys and stated:

> Now, the Federal death tax credit is $6,887.00. In otherwords [sic], a little more than the worksheet figures out and rather than send this extra money to the State of Nebraska on an estate tax, I propose that the extra credit be divided among the counties proportionately; which I have done. So, each of you fellows is getting a bit more. Tell me if you find this agreeable.
>
> I am enclosing a stipulation and waiver which, if satisfactory, please sign and return to me.

John Thomas, Knox County attorney when the West inheritance tax was determined, testified about his general procedure followed for stipulation to an inheritance tax worksheet, which included his consideration of property valuations, deductions, and the computation of the inheritance tax reflected in the tendered worksheet. After applying various "rules of thumb" to the inheritance tax worksheet for the West estate, Thomas accepted the worksheet prepared by Roubicek and "stipulated" that the inheritance tax was $48,375, inasmuch as Thomas had satisfied himself that Knox County "was entitled to something in the neighborhood of 48,000 maybe a little more, maybe a little less." Although he did not recant the figure reflected on the questioned worksheet for the amount of inheritance tax due Knox County, Thomas conceded that the stipulated values in the worksheet would not support the inheritance tax liability stated in that worksheet. Regarding another estate for which Roubicek was the personal representative's attorney, Thomas admitted that there was a stipulation between Roubicek and Thomas whereby the inheritance tax was intentionally overstated and, therefore, deliberately overpaid to Knox County to avoid payment of an estate tax to the State of Nebraska.

In his testimony, Roubicek offered lengthy explanations about some methods for valuation different from the methodology utilized for the West estate, that is, methods which might have produced property valuations greater than those entered on the worksheet approved by Thomas. According to Roubicek, those other methods of possible valuation might have increased the value of the West estate to somewhere near $10 million and, correspondingly, would have increased the West inheritance tax to $48,375, as asserted in the inheritance tax worksheet filed in the county court. Notwithstanding the other methods of possible valuation which might have resulted in the inheritance tax of $48,375, Roubicek admitted that, as stated in the worksheet, Thomas and he had stipulated to specific estate valuations for inheritance tax purposes as well as to the overstated amount of $48,375 as the inheritance tax due Knox County. As an explanation for the overstatement of inheritance tax due Knox County, Roubicek

testified: "I am faced with an inheritance tax proceeding in which my clients properly are required to disclose all their financial transactions perhaps for two or three years, which they are extremely desirous of avoiding . . . ."

County Court's Decision. The county court found that the inheritance tax order was procured through collusion of counsel and intentional fraud. Also, the court found that the 2-year statute of limitations (§ 25-2008) did not bar the Tax Commissioner's action, because the Tax Commissioner, in the exercise of reasonable diligence, could not have discovered the fraud within the 2 years after the fraudulently obtained inheritance tax order. As a result of those findings, the county court set aside the inheritance tax order entered on June 16, 1981, and ordered a redetermination of the inheritance tax liability concerning the death of Loyd West. On appeal by the personal representative, the district court affirmed the county court's judgment which set aside the inheritance tax order.

In the appeal to this court, the personal representative contends (1) Nebraska's estate tax law is unconstitutional; (2) the 2-year statute of limitations in § 25-2008 prevented the county court from setting aside the inheritance tax order; and (3) fraud, required to set aside a judgment pursuant to § 25-2001, has not been established.

CONSTITUTIONALITY OF NEBRASKA ESTATE TAX

Delegation of Legislative Power. Being and remaining liable until the state estate tax is paid, see § 77-2102, and in her initial attack on the constitutionality of the Nebraska estate tax, the personal representative of the West estate contends that the Nebraska Legislature, in adopting a state estate tax determinable in reference to the amount of federal estate tax liability, has delegated to the United States the power to raise state revenue by taxation. See, Neb. Const. art. VIII, § 1 ("The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct"); Neb. Const. art. III, § 1 ("[T]he legislative authority of the state shall be vested in a Legislature . . .").

With the possible exceptions of Nevada and South Dakota, the several states of the United States have adopted a system of

death tax statutes which, in substance and at a minimum, impose a state estate tax equal to the credit allowed for state death taxes in fixing the federal estate tax. See *Estate of Fasken*, 19 Cal. 3d 412, 563 P.2d 832, 138 Cal. Rptr. 276 (1977). The state estate tax has been characterized as a "pickup tax," or, as described in *Estate of Fasken, supra*,

> Each state according to the [*Treichler v. Wisconsin*, 338 U.S. 251, 70 S. Ct. 1, 94 L. Ed. 37 (1949)] formula may properly levy a pick-up tax which is calculated by first apportioning the federal state death tax credit according to the ratio of property which lies within its borders, and then reducing that apportioned credit by its inheritance tax. The balance of the apportioned credit constitutes the pick-up tax.

19 Cal. 3d at 428, 563 P.2d at 841-42, 138 Cal. Rptr. at 285-86.

In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), this court considered the constitutionality of certain income tax statutes of Nebraska enacted pursuant to an amendatory constitutional provision, namely, Neb. Const. art. VIII, § 1B: "When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States." In *Anderson*, taxpayers, challenging the constitutionality of the income tax law as an unlawful delegation of legislative power contrary to the Nebraska Constitution, pointed to the specific language in the income tax law:

> "Any term used in [the state income tax law] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year*."

(Emphasis in original.) 182 Neb. at 395, 155 N.W.2d at 325.

This court, in *Anderson v. Tiemann, supra*, held that

Nebraska statutes imposing income taxation by reference to future income tax laws of the United States were constitutional and not an unlawful delegation of legislative power to the United States, and stated:

> It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227.

182 Neb. at 396, 155 N.W.2d at 325.

> The constitutional amendment with which we are dealing does not require, but only authorizes, the Legislature to base a state income tax law upon the laws of the United States. In connection with a state income tax law, we think it permits the Legislature to use all, part, or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so. It does not preclude the Nebraska Legislature from repealing its own present enactment or adopting a completely different method of imposition of its income tax, and the Legislature retains the complete legislative power to make all such decisions. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government.

182 Neb. at 399-400, 155 N.W.2d at 327.

Although *Anderson v. Tiemann, supra*, dealt with Nebraska statutes imposing an income tax and the present appeal deals with imposition of a state estate or excise tax, we believe that much of the rationale in *Anderson* applies to the delegation argument made by the personal representative of the West estate. Whether the Nebraska estate or excise tax, § 77-2101.01, is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature, such as the U.S. Congress. Although the Nebraska estate tax is correlative in operation with the federal estate tax

law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature. As stated in *Anderson v. Tiemann*, 182 Neb. 393, 396, 155 N.W.2d 322, 325 (1967): "[T]he Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States." Similar to the rationale employed in *Anderson v. Tiemann, supra*, we conclude that § 77-2101.01 specifies a tax which, although referable to federal law for computation of the amount payable to the State of Nebraska, remains subject to the power of the Nebraska Legislature, which determines whether such tax exists or will continue to exist.

Courts of other jurisdictions have reached a conclusion similar to ours, when those courts were called upon to consider a delegation argument against a state tax statute which, in defining terms or computing the amount of state tax, refers to federal statutes or regulations. For example, in *City Natl. Bk. v. Iowa State Tax Comm.*, 251 Iowa 603, 102 N.W.2d 381 (1960), the Iowa Supreme Court held that the phrase "taxable income," used in the Iowa income tax statute, which referred to the Internal Revenue Code of 1954 for the definition of "taxable income," was not an unconstitutional delegation of state power to tax, and expressed:

> [I]t is quite apparent that the only purpose in the reference to the federal statutes is for a definition of "adjusted gross income" and to broaden the definition of "gross income" in our prior law to include such income as that on capital gains under the federal definition. No attempt is made to make the construction or interpretation of such definitions by federal authorities the law in Iowa, and they are not given power to determine or fix the Iowa tax. In other words, the reference is not for the purpose of "fixing such tax" . . . .

251 Iowa at 617, 102 N.W.2d at 389. See, also, *First Federal Savings & Loan Assn. v. Connelly*, 142 Conn. 483, 493, 115

A.2d 455, 459 (1955) (defining "net earning" by reference to federal income tax law was not an unconstitutional delegation of power to tax; "This is not a delegation of legislative power but an incorporation by reference of the federal law into the state law"); *Parker Affiliated Cos., Inc. v. Department of Revenue*, 382 Mass. 256, 266, 415 N.E.2d 825, 831 (1981) (incorporation of federal tax law into state statute on income taxation was not an unconstitutional delegation of power to tax; " '[Federal] action may influence the amount of the tax payable, but the taxing power has not been delegated to [the Federal government]' ").

Therefore, we hold that, while § 77-2101.01 sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.

Separation of Powers. Next, in questioning the constitutionality of the Nebraska estate tax, the personal representative of West's estate proposes that, inherent in the procedure for determination of Nebraska death taxes, there is a conflict of interest statutorily demanded of a county attorney, namely, the county attorney must represent both the county and the State of Nebraska concerning matters immediately affecting the inheritance tax and ultimately bearing upon the Nebraska estate tax. See § 77-2018.03 ("In all matters involving the determination of inheritance tax . . . [i]t shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney"). See, also, *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84

N.W.2d 136 (1957) (county attorney has the duty to represent the county and the state in inheritance tax matters). Such double duty required of the county attorney, the personal representative argues, constitutes legislative direction of a lawyer's conduct and, therefore, intrudes into the province of the Supreme Court of Nebraska, which is responsible for supervision of a lawyer's professional conduct.

The personal representative does not suggest in what manner death taxes were increased, or would be increased, or how any taxpayer's liability for death taxes was, or would be, enhanced or otherwise adversely affected by the dual duty of the county attorney in representation of both the state and county regarding matters pertinent to death taxes payable under Nebraska law.

For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. See *State v. Irwin*, 208 Neb. 123, 302 N.W.2d 386 (1981). See, also, *State v. Michalski*, 221 Neb. 380, 393, 377 N.W.2d 510, 519 (1985) ("To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue").

Whatever may be the onus imposed on a county attorney as a result of the statutory duty to represent both the state and county in matters affecting death tax liability, the personal representative of West's estate has failed to demonstrate that the county attorney's dual duty has caused, or will cause, any legally recognizable prejudice or injury pertaining to the estate's potential liability for the Nebraska estate tax. Without an adverse effect regarding the West estate's potential liability for the Nebraska estate tax, the personal representative of the West estate does not qualify as one with standing to contest the constitutionality of § 77-2101.01.

Apportionment Contention. In her brief, the personal representative states:

> The third area of unconstitutionality does not apply on the particular facts of this case, which is to say in this

> particiular [sic] case, there was not apportionment between the states. . . .
>
> To show how the Nebraska state proration and apportionment between the states rule would, or could be, assume these facts for our hypothetical situation . . . .

Brief for Appellant at 20. The personal representative then sets out a hypothetical case involving an estate containing real estate in Nebraska and Colorado and a problematic conflict between the states concerning their respective state estate taxes and the federal credit allowable for state death taxes. However, the West estate does not contain any property located outside the State of Nebraska and taxable under the death tax statute(s) of another state. In the West estate, all the federal estate tax, as well as the credit for state death taxes, is based on property entirely situated in and taxable by Nebraska. The personal representative of West's estate admits that the basis for alleged unconstitutionality is purely hypothetical.

Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution. See *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980). See, also, *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973). " 'The province of a court is to decide real controversies and to determine rights actually controverted, and "The judicial power does not extend to the determination of abstract questions." ' " *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 36, 388 N.W.2d 93, 99 (1986) (citing and quoting from *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57 (8th Cir. 1950)).

Any problem arising out of interstate apportionment of the federal credit for state death taxes, if that were the consequence of § 77-2101.01, is not a justiciable controversy in the present proceedings, but is purely a conjectural question and, as such, need not be answered.

STATUTE OF LIMITATIONS

The personal representative claims that the 2-year limitation of actions, prescribed by § 25-2008, prevents setting aside the county court order on inheritance tax—a remedy or relief authorized by § 25-2001(4) on account of fraud in obtaining a judgment or order, because the petition to vacate was filed in November 1983, more than 2 years after the inheritance tax order was entered in June 1981. The Tax Commissioner counters that the 2-year limitation of § 25-2008 does not apply when the fraud which produces the judgment or order to be set aside is not discovered within the 2 years immediately after the judgment or order sought to be vacated.

Construing § 25-2008 (statute of limitations) in conjunction with § 25-2001(4) (fraud as a basis for setting aside a judgment), this court, in *Katz v. Swanson*, 147 Neb. 791, 24 N.W.2d 923 (1946), adopted the equitable doctrine of fraud-discovery as an exception to the strict application of the 2-year limitation prescribed by § 25-2008, when the fraud has not been discovered, or in the exercise of reasonable diligence could not have been discovered, during the 2 years immediately following the fraudulently obtained judgment. In *Katz*, this court stated:

> "The only exception to the statutory limitation of two years is where the fraud was not discovered within that period. This court has set out the rule in the following apt language: 'Equity will afford relief against a judgement procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.' [Citation omitted.] . . . 'Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve.' [Citation omitted.]"

147 Neb. at 796, 24 N.W.2d at 926-27.

The Tax Commissioner's petition to vacate contained the

allegation that the fraud which produced the inheritance tax order was not discovered, and was not discoverable, in the exercise of the Tax Commissioner's due diligence within the 2 years after such order on inheritance tax. In substance, a 706N is virtually self-validating without extrinsic corroboration, except for the county certificate evidencing payment of the inheritance tax. Evidence demonstrates that, in its review of Nebraska estate tax returns, including the estate tax return for the West estate, the Nebraska Department of Revenue is not supplied with any particular data or computations underlying the figures entered on the estate tax return. In the 706N for the West estate, the reported amount of paid inheritance tax was corroborated by a certificate issued from Knox County as the collecting county. There was nothing inherent in the other limited information or unexplained figures appearing on the face of the West estate's 706N which would indicate irregularity or illegality infecting the process used in arriving at the monetary figures reported in the estate tax return. Until word reached the Department of Revenue concerning possible irregularity in the returns filed by several estates administered in Knox County, there was no indication to the department or departmental suspicion that there might be something awry in the 706N filed by the West estate. The evidence supports the county court's conclusion that the Nebraska Tax Commissioner (Department of Revenue) did not discover, and in the exercise of reasonable diligence could not have discovered, the overstated and misrepresented amount of the inheritance tax due Knox County, as reflected on the inheritance tax worksheet, which, by stipulation of counsel, was submitted to the county court for inheritance tax purposes. There is no error in the county court's applying the equitable doctrine of fraud-discovery to exonerate the 2-year limitation prescribed by § 25-2008 and thereby proceeding to decide whether relief should be granted as authorized in § 25-2001(4).

VACATING A JUDGMENT OR ORDER

Nature of Remedy. As we have already determined in this appeal, the county court properly allowed the Tax Commissioner to proceed under the fraud-discovery exception to the 2-year limitation prescribed by § 25-2008, because the

Tax Commissioner could not have discovered the alleged fraud within the statutorily dictated limitation of time. However, as authorized under § 25-2001(4), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms. See 46 Am. Jur. 2d *Judgments* § 684 (1969). See, also, *Miles v. Layton*, 38 Del. 411, 193 A. 567 (1937); *Keane v. Allen*, 69 Idaho 53, 202 P.2d 411 (1949); *Rossten v. Wolf*, 14 Ill. App. 2d 322, 144 N.E.2d 757 (1957). This court has repeatedly recognized that a court's jurisdiction based on § 25-2001 is concurrent with a court's independent equity jurisdiction. See, *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983); *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952); *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947); *In re Estate of Jensen*, 135 Neb. 602, 283 N.W. 196 (1939); *Pavlik v. Burns*, 134 Neb. 175, 278 N.W. 149 (1938). Also, we are reminded that, in *Katz v. Swanson*, 147 Neb. 791, 24 N.W.2d 923 (1946), a case previously mentioned in this opinion concerning the statute of limitations, this court adopted a discovery rule for cases involving a fraudulently obtained judgment, notwithstanding the time limitation prescribed by § 25-2008, thereby recognizing applicability of an equitable doctrine in relation to a statutory action for vacation of a judgment. Thus, equitable consideration in the setting of statutorily authorized relief is not a novelty in Nebraska jurisprudence. If, as expressed by Selden, the standard for measure of equitable conscience is the "Chancellor's foot," fraud is indeed a bunion.

Burden of Proof. Under § 25-2001(4), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to

secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question. See, *County of Lincoln v. Provident Loan & Investment Co.*, 147 Neb. 169, 22 N.W.2d 609 (1946); *Pinches v. Village of Dickens*, 131 Neb. 573, 268 N.W. 645 (1936); *Kielian v. Kent & Burke Co.*, 131 Neb. 308, 268 N.W. 79 (1936).

Standard of Review. In reviewing a trial court's action in vacating or refusing to vacate a default judgment, see *Bigler v. Baker*, 40 Neb. 325, 58 N.W. 1026 (1894), or action in setting aside or refusing to set aside a judgment obtained through a trial, see *State v. Cottingham, ante* p. 270, 410 N.W.2d 498 (1987), the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion. By analogy, a trial court's disposition of a request to vacate a judgment or order allegedly obtained by fraud and entered at a previous term of court should be evaluated by the same standard applicable to requests involving a default judgment or judgment obtained through a trial. Therefore, we hold that under § 25-2001(4), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.

FRAUD AND COLLUSION

In her third assignment of error, the personal representative contends that the county court erred in determining that the Tax Commissioner had proved fraud to justify vacating the inheritance tax order, as authorized by § 25-2001(4). In the petition to set aside the inheritance tax order, the Nebraska Tax Commissioner alleged that there was actual or intentional fraud and collusion which produced the inheritance tax order and eliminated the potential Nebraska estate tax. The personal representative contends that, to prevail in the action to set aside the inheritance tax order, the Tax Commissioner must present proof suitable to sustain a cause of action for fraud (misrepresentation of a material fact). As we expressed in

Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 407-08, 390 N.W.2d 487, 491 (1986):

> To recover on a claim for fraud, [a plaintiff] must show (1) that a representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.

The personal representative asks, "What business man wants to expose his books to public scrutiny if he can avoid it?" Brief for Appellant at 25. Later, the personal representative points out that "[t]here are three parties to the Inheritance Tax Determination. They are the county, the State of Nebraska, and the estate," and then asks another rhetorical question: "Did the State rely upon the representations made by the estate's attorney?" Brief for Appellant at 30. The State did not rely on the overstated and misrepresented amount of inheritance tax reflected on the inheritance tax worksheet, but such absence of reliance does not prevent vacating the inheritance tax order.

Collude means to "connive with another : conspire, plot." *Collusion* is a "secret agreement : secret cooperation for a fraudulent or deceitful purpose . . . as . . . a secret agreement between two or more persons to defraud a person of his rights often by the forms of law." Webster's Third New International Dictionary, Unabridged 446 (1981). See, also, *Tomiyasu v. Golden*, 81 Nev. 140, 400 P.2d 415 (1965); *Clinton Coop. F. E. Assn. v. Farmers U. G. T. Assn.*, 223 Minn. 253, 26 N.W.2d 117 (1947); *Colegrove v. John Hancock Mut. Life Ins. Co.*, 153 S.W.2d 750 (Mo. App. 1941). As the U.S. Supreme Court stated in *Dickerman v. Northern Trust Company*, 176 U.S. 181, 190, 20 S. Ct. 311, 44 L. Ed. 423 (1900):

> Collusion is defined by Bouvier as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law," and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the

accomplishment of an unlawful purpose . . . .

As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, "especially where the court was imposed upon thereby and the complaining party was prevented from having his interest fairly presented or fully considered by the court." 46 Am. Jur. 2d *Judgments* § 16 at 323 (1969). See, also, *Harjo v. Johnston*, 187 Okla. 561, 104 P.2d 985 (1940); *Abernathy v. Huston*, 166 Okla. 184, 26 P.2d 939 (1933); *Ferguson v. Ferguson*, 98 S.W.2d 847 (Tex. Civ. App. 1936); 49 C.J.S. *Judgments* § 269 (1947). As expressed by the Iowa Supreme Court in *Scheel v. Superior Mfg. Co.*, 249 Iowa 873, 883, 89 N.W.2d 377, 383-84 (1958):

> "It has been said that all deceitful practices in depriving or endeavoring to deprive another of his known rights by means of some artful device or plan contrary to the plain rules of common honesty constitute fraud sufficient to warrant interference with a judgment by a court of equity. It matters little how the fraud is effected; a court looks to the effect, and asks if the result is a consequence of fraud."
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> . . .
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> . . . .
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> . . . "* * * in the final analysis each case must be judged on its own facts in determining whether the circumstances amount to fraud so as to justify equitable relief against a judgment. Broadly speaking, if the result complained of is a consequence of fraud, the mode or manner in which the fraud was effected is immaterial."

See, also, 46 Am. Jur. 2d, *supra* at § 832.

In the present case, the State seeks to set aside a judgment procured through collusive misrepresentation by its attorney. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for a litigant and the adversary of the litigant. *Mercantile Comm. Bank v. Southwestern, etc., Corp.*, 93 Ind. App. 313, 169 N.E. 91 (1929); *Sturm v. School-District No. 70*, 45 Minn. 88, 47 N.W. 462 (1890). As noted in 46 Am. Jur. 2d, *supra* at § 827 at 984: "[E]quitable relief from a judgment exist[s] where an attorney fraudulently

pretended to represent a party but actually connived at his defeat, or, being regularly employed, corruptly sold out his client's interest."

Sir Walter Scott must have foreseen counsel's conduct in the present case, when he wrote:

> Oh, what a tangled web we weave,
> When first we practice to deceive!

While both Roubicek and Thomas offered various afterthoughts as methods for arriving at valuations different from, and greater than, the valuations actually used for inheritance tax purposes, the evidence, stripped of all verbal veneer, presents the crystallized fact that the attorneys, through their stipulated inheritance tax worksheet, jointly and deliberately overstated the amount of inheritance tax due Knox County, thereby carrying out their surreptitious agreement to eliminate the potential Nebraska estate tax on the West estate. The inheritance tax of $48,375, reflected on the worksheet, was absolutely impossible on the basis of the valuations reported in that document filed with the county court. Through the deceitful stipulation, each party interested in death tax liability relative to the West estate gained a very real advantage, except the State of Nebraska. For the West devisees, silence was acquired and nondisclosure assured, for, as acknowledged by the personal representative: "The heirs were anxious to avoid producing their books of account, and so on, in a county court inheritance tax hearing." Brief for Appellant at 24. For Knox County, there was the all-too-obvious exaggerated inheritance tax collected by the county. For the State of Nebraska, the attorneys' stipulation produced only injury—loss of the state estate tax. Roubicek and Thomas spawned the inheritance tax worksheet and its collusive misrepresentation, which was an integral and causative element in the production of an inheritance tax determination effectively eliminating payment of a Nebraska estate tax. Although it is true that the State of Nebraska did not rely on any factual misrepresentation by Roubicek and Thomas, it is also equally true that the State of Nebraska, through its attorney's connivance with the attorney for the personal representative, was prevented from having its interests fairly presented in the matter of the inheritance tax,

which ultimately became crucial in determining whether an estate tax was due the State of Nebraska. The inheritance tax worksheet was an intentionally fraudulent device to eliminate the Nebraska estate tax and was an artful scheme condemned by fundamental rules of honesty applicable to a lawyer representing the interests of a client. With respect to the interests of a client, a lawyer is expected to display dedicated protection, not deliberate damage. Consequently, we disagree with the personal representative, who suggests that the absence of the State's reliance on a factual misrepresentation, otherwise required to sustain a cause of action for civil fraud, precludes vacating a judgment which is the product of fraud and collusion by the county attorney, as the attorney for the State of Nebraska under § 77-2018.03. Therefore, we hold that if a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under § 25-2001(4) to the injured party. In that manner, we not only avoid relegating a party injured through collusion by that party's lawyer to another action outside the proceedings which produced the fraudulent judgment, that is, an action against the collusive lawyer, but we also avert time-consuming and expensive additional litigation to rectify the inequity caused by a lawyer's deceit toward the client.

The evidence presented to the county court supports, if not compels, the finding of fraud and collusion detrimental to the State of Nebraska.

> A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

Bump v. Firemens Ins. Co., 221 Neb. 678, 689, 380 N.W.2d 268, 276 (1986). Tested by a factual foundation and the plain rules of common honesty, the county court's judgment setting aside the inheritance tax order does not constitute an abuse of

discretion.

ERROR ASSIGNED BUT NOT ARGUED

In her final assignment of error the personal representative alleges that the county court erred in overruling the personal representative's motion for a mistrial, an error not discussed in the argument portion of the personal representative's brief. Therefore, we decline to consider this assignment of error, because "consideration of assignments of error is limited to those discussed in the brief." *State v. Evans*, 215 Neb. 433, 444, 338 N.W.2d 788, 795 (1983); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

We affirm the district court's judgment, which affirmed the the county court's judgment, vacating and setting aside the inheritance tax order entered in the estate of Loyd West, deceased.

AFFIRMED.

GLENN E. McCOMBS, APPELLANT, V. ELMER A. PRENOSIL, APPELLEE.
GLENN E. McCOMBS, APPELLANT, V. ELMER A. PRENOSIL ET AL., APPELLEES.
415 N.W.2d 453

Filed November 20, 1987. Nos. 85-721, 85-1014.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT and JEFFRE CHEUVRONT, Judges. Affirmed.

Barry L. Hemmerling of Jeffrey, Hahn & Hemmerling, P.C., for appellant.

Robert R. Gibson of Professional Legal Associates of Nebraska, P.C., for appellee Elmer Prenosil.

John D. Ragsdale, for appellee Woodmen Accident and Life Company.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The appellant's brief in these cases contains no assignments of error. Neb. Rev. Stat. § 25-1919 (Reissue 1985) and the rules of this court, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), require that each error assigned shall be separately stated in an appellant's brief. In the absence of an assignment of error, the judgment will be affirmed, unless the court notes plain error on the record. *Baggett v. City of Omaha*, 220 Neb. 805, 373 N.W.2d 391 (1985).

Since the records in these cases fail to disclose plain error, the judgments are affirmed.

AFFIRMED.

LUSCHEN BUILDING ASSOCIATION, A COPARTNERSHIP, APPELLEE, V. FLEMING COMPANIES, INC., A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, ALFRED W. DOLEZAL ET AL., THIRD-PARTY DEFENDANTS, APPELLANTS.

415 N.W.2d 453

Filed November 20, 1987. No. 85-946.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Contracts.** The construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity

unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

4. _____. That two parties urge opposing interpretations of a contract does not necessarily indicate the document is ambiguous.
5. _____. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
6. **Contracts: Juries: Courts.** When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
7. **Contracts: Summary Judgment.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
8. **Evidence.** Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace or settle a controversy without respect to legal liability, is not admissible against the person making it.
9. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
10. **Judgments: Appeal and Error.** Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Reversed.

Stephen H. Nelsen and Shawn D. Renner of Cline, Williams, Wright, Johnson & Oldfather, for appellant Fleming Companies.

Stephen C. Hansen and Eugene G. Schumacher of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellants Dolezal et al.

Vance E. Leininger of Leininger, Grant, Rogers & Maul, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Platte County. Fleming Companies, Inc. (defendant and third-party plaintiff

below), Alfred W. Dolezal, Christine Dolezal, Joseph L. Gdowski, and Marcelline L. Gdowski (third-party defendants below) appeal from a summary judgment order and a judgment entered pursuant to that order. The appeals have been consolidated.

This appeal involves the interpretation of a lease, specifically a repair clause within a lease and a sublease. Luschen Building Association, appellee lessor, brought this action in the district court against Fleming, lessee, to compel it to repair or replace a parking lot on leased premises. Fleming then filed a third-party complaint against Dolezals and Gdowskis, sublessees, which alleged that if Fleming was held liable for said repairs, then the sublessees would be liable to Fleming for that work.

Luschen and Fleming entered into the original lease agreement on July 15, 1966. This lease was amended twice to extend the term and provide for increased rental rates. The repair clause remained as it had been set forth in the original lease. This clause, section 9, is at the heart of the dispute in this case and is set out in its entirety.

> 9. The Lessor shall maintain in good condition the structural parts of the building on the premises, including the exterior walls, roof, footings, and foundation, and shall perform any repairs made necessary by reason of such maintenance.
>
> The Lessee shall maintain in good condition the interior of the building on the premises including all doors both manually-operated and automatic, all glass including glass exposed to the exterior, and all heating, air conditioning, electrical, and plumbing fixtures, equipment, and services in said building or on the premises appurtenant thereto, and in addition shall provide all painting and decorating to the exterior of said building, and shall provide all maintenance and repair to the parking lot, parking lot lights, lighting, and striping.
>
> Should either the Lessor or the Lessee fail, for a reasonable period of time after notice by the other, to maintain the portions of the premises herein undertaken by each to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear

> excepted, the other party hereto having so given reasonable notice of the necessity for such maintenance, may proceed to provide such maintenance as reasonably required on behalf of the party so failing to provide the same; and if provided by the Lessee on behalf of the Lessor, the former may deduct the cost thereof from future installments of base rent as the same become due until reimbursed; and if provided by the Lessor on behalf of the Lessee, the cost thereof shall be paid by the Lessee to the Lessor simultaneously with the next monthly installment of base rent when the same falls due.

The sublease at issue in this case has a more complicated history. Fleming originally sublet the premises to parties not associated with this appeal on July 16, 1966. Those sublessees assigned the sublease to Dolezals and Gdowskis on March 26, 1968, to become effective April 7, 1968. The term was to expire July 15, 1976.

In June of 1972 Fleming and the sublessees, Dolezals and Gdowskis, executed a revised sublease which superseded and replaced the 1966 assigned sublease. The 1972 sublease agreement extended the initial term by allowing the agreement to automatically renew for 6 more years after July 15, 1976. There was also a rental rate increase for the additional 6-year term. The additional term was to expire July 15, 1982.

Finally, on October 22, 1981, Fleming and the sublessees executed the last sublease agreement for a term commencing July 16, 1982, and ending July 15, 1987. This sublease was in effect and controlling on October 7, 1982, the time when the correspondence began which led to the present appeal.

The relevant sublease provisions which are crucial to this appeal are set forth as follows:

> 1. The terms of the ORIGINAL LEASE hereinabove referred to are herein incorporated by reference with like force and effect as if the same had been fully set out, and SUBLESSEE acknowledges receipt of a true and correct copy of said ORIGINAL LEASE.
>
> . . . .
>
> 9. SUBLESSEE shall perform the covenants and obligations of SUBLESSOR under the ORIGINAL

LEASE regarding maintenance and repair to the premises in strict accordance with the terms of Paragraph 9 of the ORIGINAL LEASE.

The ORIGINAL LESSOR shall maintain in good condition the structural parts of the building on the premises, including the exterior walls, roof, footings, and foundation, and shall perform any repairs made necessary by reason of such maintenance.

The SUBLESSEE shall maintain in good condition the interior of the building on the premises including all doors both manually-operated and automatic, all glass including glass exposed to the exterior, and all heating, air conditioning, electrical, and plumbing fixtures, equipment, and services in said building or on the premises appurtenant thereto, and in addition shall provide all painting and decorating to the exterior of said building, and shall provide all maintenance and repair to the parking lot, parking lot lights, lighting, and striping.

Should the SUBLESSEE fail, for a reasonable period of time after notice by the SUBLESSOR, to maintain the portions of the premises herein undertaken by SUBLESSEE to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear excepted, the SUBLESSOR hereto having so given reasonable notice of the necessity for such maintenance, may proceed to provide such maintenance as reasonably required on behalf of the SUBLESSEE so failing to provide the same; and if provided by the SUBLESSOR on behalf of the ORIGINAL LESSOR, the former may add the cost thereof to future installments of base rent as the same become due until reimbursed.

Section 10 is set out only in pertinent part as follows:

10. SUBLESSEE covenants that it will pay the rent stipulated at the time and place specified; that it will use the premises solely for the purpose above specified; that it will, at its expense, keep the premises and improvements thereon, in the same good order and repair in which they now are or may hereafter be placed, except (1) usual wear and tear, (2) acts of God and unavoidable casualties, (3)

repairs of defects for which ORIGINAL LESSOR is responsible under the ORIGINAL LEASE, and (4) damages and loss for which SUBLESSOR and ORIGINAL LESSOR have waived recovery under said ORIGINAL LEASE.

The record reveals that on October 7, 1982, Luschen began corresponding with Fleming about the deteriorating condition of the parking lot on the leased premises. Fleming then passed these concerns along to the sublessees, Dolezals and Gdowskis, and directed them to make the repairs demanded by Luschen. Sometime prior to September 1983 some repairs were undertaken on the parking lot, consisting of asphalt caulk in the cracks of the concrete. This repair was unsatisfactory to Luschen.

Correspondence between the parties continued at least through late October 1983. Luschen filed suit against Fleming for enforcement of the lease on May 10, 1984. On October 1, 1985, after numerous motions were filed and steps were taken in pretrial proceedings, Luschen eventually filed a motion for summary judgment. A hearing on the motion was held on October 11, 1985, and evidence was adduced. On November 7, 1985, another hearing was held and orders of the court were handed down regarding the parties' liabilities. A partial summary judgment was entered in favor of Luschen and against Fleming. The order stated that Fleming was "responsible under the lease agreement for . . . necessary repairs to the parking lot" and that the only issue to be tried is the question of costs and specifications of such repairs.

The court then heard a stipulation from all the parties regarding the manner of the accomplishment of the repairs and time for completion. The stipulation specifically stated that defendant and third-party defendants reserved all rights to appeal the separate judgments against them regarding actual liability for those repairs.

Finally, the court then heard arguments and received evidence regarding the action between Fleming and sublessees, Dolezals and Gdowskis. That same day the court entered a judgment against the sublessees and in favor of Fleming, holding that sublessees had assumed all the obligations to repair

and maintain the parking lot. Therefore, the court held that sublessees were liable for the repairs which had been deemed the duty of Fleming in the prior summary judgment order.

Appellant Fleming assigns as error that the district court erred in granting summary judgment for Luschen because (1) the court misinterpreted the lease provisions as a matter of law; (2) material issues of fact remain; and (3) the court improperly drew inferences from the evidence in favor of Luschen.

Appellants Dolezals and Gdowskis assign as error that the district court erred in finding that no genuine issue of material fact existed between Fleming and Luschen and finding that no genuine issue of material fact existed between Fleming and sublessees.

We begin our analysis by addressing appellants Dolezals and Gdowskis' second assigned error. The language of the assigned error infers that the district court entered a summary judgment order against sublessees and in favor of Fleming. No motion for summary judgment was ever submitted by Fleming. The record reveals that Fleming and sublessees merely submitted the issue of sublessees' liability to the court at the November 7, 1985, hearing previously mentioned. The only evidence offered and admitted was the various lease and sublease agreements offered by Fleming.

In essence, the sublessees are arguing that the judgment rendered against them was erroneous because it was based on a separate erroneous summary judgment entered against Fleming. For the following reasons, we agree.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Chadd v. Midwest Franchise Corp., ante* p. 502, 412 N.W.2d 453 (1987). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Id.* The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Id.*

The district court found, apparently as a matter of law, that

Fleming was responsible under the original lease agreement for the necessary repairs to the parking lot. This finding by the court had to be based on one of two rationales. The court could have interpreted the lease as unambiguously imposing such repair liability on Fleming as a matter of law, according to the terms of the contract alone. On the other hand, Luschen submitted into evidence letters written to Fleming and replies therefrom and argued that this correspondence constituted admissions of liability on the part of Fleming. Each of these rationales will be addressed separately.

First, it is the law of Nebraska that the construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982).

The lease language central to this controversy states that "[s]hould either the Lessor or the Lessee fail . . . to maintain the portions of the premises herein undertaken by each to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear excepted . . . ." An interpretation of the "reasonable use, wear, and tear excepted" language is essential to the determination of this case. The parties to this action are in complete disagreement as to the intent of this language.

Luschen alleges that this language refers to the "permissible condition of the premises, not the cause of that condition." Brief for Appellee at 15. Appellee asserts that the language evinces an intent to require repairs and maintenance once the premises exhibited "unreasonable use, wear, and tear" and had "deteriorated to a point where it was no longer reasonable to expect to continue to use" it in that worn condition. *Id.* In other words, Luschen asserts the premises was not expected to be kept in new condition, but was expected to exhibit some reasonable wear and tear before repairs were needed.

Fleming asserts that this language was intended to except "conditions caused by 'reasonable wear and tear' from the

maintenance obligations imposed on Fleming." Brief for Appellant Fleming at 9-10. In other words, Fleming asserts that if the condition of the parking lot was caused by "reasonable use, wear, and tear," it was Luschen's obligation to repair it as needed.

Ambiguity is measured by an objective standard, not by the subjective contentions of adversaries in a courtroom. That two parties urge opposing interpretations does not necessarily indicate the document is ambiguous. *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). However, a provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978).

In the case at bar the lease provision at section 9 seems to impose absolute liability on Fleming to maintain and repair the parking lot. However, this repair liability could be seen as limited by the "reasonable use, wear, and tear excepted" clause in the third paragraph of section 9, or by section 11, which contains a surrender clause which also excepts "usual wear and tear." Taken as a whole, the lease agreement is at best ambiguous. The extent to which the "reasonable use, wear, and tear" clause modifies either party's duties, if it does at all, is completely unclear from the face of the document. When the terms of the contract are in dispute and the real intention of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances. *First Nat. Bank v. Davis*, 123 Neb. 304, 242 N.W. 655 (1932). When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964). The summary judgment entered against Fleming by the district court was improper in that a genuine issue of material fact existed as to the true intent of the parties to the lease agreement.

As previously mentioned, the court below could have construed the written correspondence between the parties as an admission of liability from Fleming, as was argued below by

Luschen. A review of these letters reveals that this correspondence was a part of the negotiations, looking for a settlement of the dispute between Luschen, Fleming, and sublessees. " 'Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it.' " *Bishop Cafeteria Co. v. Ford, supra* at 618, 129 N.W.2d at 593. If the district court inferred an admission of liability on the part of Fleming from this correspondence, it did so improperly. In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *Chadd v. Midwest Franchise Corp., ante* p. 502, 412 N.W.2d 453 (1987). Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Id.* Fleming was entitled to the benefit of any doubt as to the ultimate inferences to be drawn from the settlement negotiations.

The judgment entered by the court against sublessees was clearly dependent upon the summary judgment entered against Fleming. The court held that Fleming's obligations as to the parking lot had been assumed by the sublessees by virtue of the sublease agreements. It is generally held that an "order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it." 5B C.J.S. *Appeal and Error* § 1951 at 514 (1958). See, generally, 5 Am. Jur. 2d *Appeal and Error* § 956 (1962). For this reason the judgment against Dolezals and Gdowskis must be reversed, due to its dependence on an erroneous summary judgment, which is also reversed.

REVERSED.

BOSLAUGH, J., concurs in the result.

KEITH COUNTY BANK & TRUST COMPANY, A NEBRASKA BANKING CORPORATION, APPELLEE, V. WHEAT BELT PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

415 N.W.2d 459

Filed November 20, 1987. No. 86-031.

1. **Nebraska Power Review Board: Electricity: Jurisdiction.** The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
2. **Mortgages: Foreclosure: Receivers: Debtors and Creditors.** A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
3. **Receivers: Debtors and Creditors.** Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Thomas M. Sonntag of John Peetz, P.C., for appellant.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell, Merritt & Williams, P.C., for appellee.

Patrick W. Healey of Healey, Wieland, Kluender, Atwood & Jacobs, for amicus curiae Nebraska Rural Electric Association.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

Neal Batterman had become contractually obligated to pay for electricity provided by appellant, Wheat Belt Public Power District, a public corporation, to power irrigation wells during 1984 on lands in which Neal Batterman, Clarice Batterman, and Batterman & Sons, Ltd., a Nebraska corporation, had ownership interests. The Batterman interests were foreclosed upon, and appellee, Keith County Bank & Trust Company, a Nebraska banking corporation, was appointed foreclosure receiver to, among other things, preserve, protect, and manage the real estate, and to conserve and nurture it in a husbandlike manner. Wheat Belt thereafter informed the receiver that if the bills Neal Batterman had incurred before the receivership came

into existence were not paid, Wheat Belt would discontinue serving the receiver. The receiver responded by filing a declaratory judgment action against Wheat Belt, seeking, among other things, a declaration that the receiver was not obligated to pay Neal Batterman's bills and an injunction preventing Wheat Belt from disconnecting electricity to the wells. The district court granted a temporary injunction; Wheat Belt then counterclaimed, asking that the receiver be held liable for the bills Neal Batterman had incurred and that the temporary injunction be dissolved. Subsequently, the district court sustained the receiver's motion to dismiss its action, and the matter proceeded to trial on the merits of Wheat Belt's counterclaim. Thereafter, the district court dismissed the counterclaim and dissolved the temporary injunction. This appeal followed. Wheat Belt assigns as error the district court's (1) finding that it had subject matter jurisdiction, (2) granting of the temporary injunction, (3) finding that the receiver did not adopt Neal Batterman's contracts with Wheat Belt, and (4) dismissal of Wheat Belt's counterclaim. We affirm.

Wheat Belt first contends that subject matter jurisdiction of this dispute is lodged not in the district court but in the Nebraska Power Review Board. The contention rests on language in Neb. Rev. Stat. § 70-1017 (Reissue 1986), which declares that if "the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished . . . the matter shall be submitted to the board for hearing and determination." However, this court recently held, in *In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986), that the Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service; that the payment of another's delinquent charges is not a term of service contemplated by § 70-1017.

A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage. *Wells v. Farmers State Bank of Overton*, 124 Neb. 386, 246 N.W. 714

(1933). Having not perfected a lien on the real estate by reducing its claim to judgment, Wheat Belt seeks to make the receiver personally liable for Neal Batterman's delinquent debt. In other words, Wheat Belt endeavors to make the receiver, someone other than Neal Batterman, pay for electricity Wheat Belt provided in the past under contracts with Neal Batterman. Thus, the district court properly asserted subject matter jurisdiction.

The amicus curiae, Nebraska Rural Electric Association, invites us to consider Wheat Belt's second assignment of error, notwithstanding the fact it has been rendered moot by the dissolution of the temporary injunction. It is an invitation we decline, for the determination that the district court had jurisdiction over the subject matter of the dispute sufficiently addresses the suggested interest of the public in resolving whether a district court has the power to grant a temporary injunction in a dispute, jurisdiction of which is lodged in the Power Review Board.

The third assignment of error claims the district court erred in finding the receiver did not adopt Neal Batterman's contracts. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership. See *Wells v. Farmers State Bank of Overton, supra*. Nevertheless, Wheat Belt presses the theory that in accepting the benefits of electric service, the receiver in this case adopted Neal Batterman's prior contracts with Wheat Belt and so came to stand in his shoes with respect to the delinquencies arising under those contracts. Wheat Belt first argues that as the receiver did not apply for service in its own right, it necessarily assumed the contracts executed by Neal Batterman. The fallacy in this position is that Wheat Belt had told the receiver electric service would not be provided unless Neal Batterman's past-due bills were paid. In the face of Wheat Belt's position, an application for service by the receiver would have been futile; instead, the receiver chose to challenge Wheat Belt's position in court. Wheat Belt's second argument, that since the receiver accepted the benefits of Neal Batterman's contracts, it must also accept the liabilities arising under those contracts, is equally spurious. The Neal Batterman contracts concerned

themselves with the service provided before the receivership came into existence; the receiver obtained no benefits under them whatsoever.

The resolution of the fourth and last assignment of error, that the district court erred in dismissing Wheat Belt's counterclaim, is controlled by the analyses of the first three assignments of error. Thus, the fourth assignment of error does not warrant separate discussion.

There being no merit to Wheat Belt's assignments of error, the decision of the district court is affirmed.

AFFIRMED.

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLANT, V. ROBERT L. MEINS AND JANE M. MEINS, HUSBAND AND WIFE, ET AL., APPELLEES.

415 N.W.2d 462

Filed November 20, 1987. No. 86-288.

1. **Corporations: Mortgages: Foreclosure.** Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
2. **Demurrer: Pleadings: Judicial Notice.** On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
3. **Judicial Notice.** Courts take judicial notice of the public and general acts of Congress.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for further proceedings.

James H. Dodson of Dodson and Dodson, and William H. Stowell, for appellant.

Rodney R. Smith of Smith & Boyd, for appellees Meins.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

Standard Federal Savings and Loan Association, plaintiff-appellant, filed its petition to foreclose a real estate mortgage on certain property in the town of Homer, Dakota County, Nebraska. Defendants-appellees Robert L. Meins and Jane M. Meins, the owners of the property, had given the mortgage to plaintiff's assignor.

In its petition, plaintiff set out that "Plaintiff is a Banking Association with its principal place of business in Gaithersburg, Maryland."

Defendants demurred to this petition, stating: "1. The Plaintiff has not legal capacity to sue in this matter; 2. There is a defect of parties, Plaintiff; 3. Plaintiff's petition does not state facts sufficient to constitute a cause of action . . . ."

This demurrer was sustained, and plaintiff was given 30 days "in which to amend its Petition." Plaintiff then filed an amended petition, in the same terms as its original petition but with two paragraphs added, as follows:

> 2. That the Plaintiff does not have a certificate of authority to transact business in the State of Nebraska.
>
> 3. That Plaintiff is not required to have a certificate of authority to foreclose its mortgage against the Defendants herein by virtue of Neb. Rev. Stat. Sections 21-20,105 (1), (7), (8) and (9) (Reissue of 1983).

Defendants again demurred, setting out the same three grounds set forth in their original demurrer and adding a fourth paragraph, that "the issues raised by this Demurrer are Res Adjudicata [sic], having been fully decided by this Court by its Journal Entry . . . ."

The court found that "the Demurrer of the Defendants should be sustained for the reasons set out therein," and sustained the demurrer. After plaintiff advised the court that it chose not to further plead, the court dismissed the amended petition. Plaintiff timely appealed to this court.

The four grounds stated in defendants' demurrer to the amended petition are set out above. Examination of the

transcript shows that if plaintiff's statement as to its status is sufficient, the petition does state facts sufficient to constitute a cause of action, and there is no defect in parties plaintiff.

The fourth ground stated by defendants, that is, that the issues in defendants' demurrer to the amended petition had been decided in the court's ruling on defendants' demurrer to the original petition and the earlier ruling was res judicata, is without merit. The sustaining of defendants' first demurrer was not a final order. Plaintiff amended its petition to put the issue of its capacity to sue in sharp focus, and the court, after sustaining the demurrer, dismissed the case. It is from this order of dismissal that this appeal is taken.

The only arguably valid ground on which defendants' demurrer was sustained is that "[t]he Plaintiff has not legal capacity to sue . . . ." Plaintiff attacks that ground in its assignment of error that the trial court "erred in concluding that Appellant was required to register as a foreign corporation in Nebraska in order to foreclose its mortgage." We determine the trial court was in error and reverse the dismissal of plaintiff's action.

Neb. Rev. Stat. § 21-20,105 (Reissue 1983) provides in pertinent part:

> [A] foreign corporation shall not be considered to be transacting business in this state, for the purpose of being required to secure a certificate of authority pursuant to this section, by reason of carrying on in this state any one or more of the following activities:
>
> (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
>
> . . . .
>
> (7) Creating, as a borrower or lender, or acquiring indebtedness, mortgages, or other security interests in real or personal property;
>
> (8) Securing, collecting, or servicing debts or enforcing any rights in property securing the same;
>
> (9) Transacting any business in interstate commerce . . . .

Since we are deciding this case on demurrer, we accept the well-pleaded facts in the petition as true. *Knoell v. Huff*, 224

Neb. 90, 395 N.W.2d 749 (1986). Examination of those pleadings shows that plaintiff is a federal savings and loan association, that the note and the mortgage in question were executed in Nebraska, that the mortgage originally provided that payments due thereunder were to be made at the original mortgagee's office in San Antonio, Texas, that the holder of the original mortgage assigned its rights under the mortgage to plaintiff by an assignment executed in the State of Texas, and that plaintiff is a banking association with its principal place of business in Gaithersburg, Maryland.

Without regard to plaintiff's contention that § 21-20,105(1), (7), or (9) applies to this situation and operates to remove any requirement that plaintiff had to secure a certificate of authority before foreclosing the mortgage in question, we note that § 21-20,105(8) provides that a foreign corporation need not secure such a certificate for the activity of "[s]ecuring, collecting, or servicing debts or *enforcing any rights in property securing the same*." (Emphasis supplied.)

In this case plaintiff is clearly trying to enforce a right it has in property which has been mortgaged to secure the debt assigned to plaintiff. We hold that where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, § 21-20,105(8) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in that activity.

If there be any question that plaintiff has not identified itself as a foreign corporation, we note that 12 U.S.C. § 1464(a) (1982) provides, in part, that the Federal Home Loan Bank Board is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations . . . ." The petition shows that plaintiff, Standard Federal Savings and Loan Association, is a foreign corporation within the meaning of § 21-2002(2).

On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice. 61A Am. Jur. 2d *Pleading* § 279 (1981); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb.

507, 31 N.W.2d 477 (1948). Courts take judicial notice of the public and general acts of Congress. 29 Am. Jur. 2d *Evidence* § 32 (1967).

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. GARY LEE JACKSON, APPELLANT.
415 N.W.2d 465

Filed November 20, 1987. No. 86-978.

Postconviction. An evidentiary hearing on a postconviction motion is required upon an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded for further proceedings.

Peter K. Blakeslee, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Defendant appeals from the denial of his petition for postconviction relief in the district court for Lancaster County. On April 17, 1985, after defendant was found guilty in a jury trial of three counts of burglary, of three different Lincoln public schools, he was sentenced to an indeterminate term of 2- to-4 years' imprisonment on each of the three counts. The sentences were to be served consecutively.

In that case defendant appealed to this court. Defendant's counsel filed a motion to withdraw as counsel pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Defendant then filed a pro se motion opposing withdrawal. Defendant's motion in opposition consisted of complaints about defense counsel's failure to call other witnesses or to investigate facts which these witnesses would purportedly testify to, thereby denying defendant effective assistance of counsel. This court granted counsel's motion to withdraw, and defendant's convictions and sentences were affirmed in *State v. Jackson*, 221 Neb. xx (case No. 85-445, Jan. 14, 1985).

On August 7, 1986, defendant filed a pro se "Motion to Vacate and Set Aside Judgement and Sentence," pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1985). The motion was in 14 numbered paragraphs, alleging generally the ineffective assistance of trial counsel and setting out specifically allegations of such ineffective assistance. On September 22, 1986, defendant filed an amended motion to vacate, with the same general allegations of ineffective counsel, but setting out specific allegations of such ineffective assistance in 50 paragraphs. Defendant prayed for a hearing on his motion and for an order requiring the State to show cause why his conviction should not be set aside. The State opposed defendant's motion. After a hearing at which defendant was present and requested counsel, defendant's motion was denied by the trial court's order that the "files and records and exhibits received show that defendant is entitled to no relief and an evidentiary hearing is not required. Motions of defendant for vacation of sentence are overruled. Motion of defendant for appointment of counsel is overruled."

On November 14, 1986, the defendant timely appealed. On November 17, upon the district court's own motion, an attorney was appointed to represent defendant on appeal to this court.

Defendant's four assignments of error may be consolidated into two: (1) The trial court erred in not determining that defendant had been denied the effective assistance of counsel at his trial; and (2) the court erred in not granting an evidentiary hearing on defendant's motion for postconviction relief.

With regard to the alleged error in not granting a hearing on defendant's postconviction motion, we are governed by our general rule that an evidentiary hearing is not required if the motion and the files and records of the case show that the defendant is not entitled to relief. § 29-3001; *State v. Rivers, ante* p. 353, 411 N.W.2d 350 (1987). On the other hand, the statute requires a "prompt hearing" on an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right. *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985). It is obvious that defendant has a constitutional right to effective counsel. As will be shown below, the trial court erred in denying an evidentiary hearing on defendant's motion, because the record does not show that defendant was not entitled to a hearing.

Defendant's issues which he contends support his claim of ineffective counsel are grouped into five in his brief: (1) that his trial counsel failed to challenge, on fourth amendment grounds, the seizure of certain evidence from defendant's vehicle; (2) that his trial counsel failed to challenge, on fifth amendment grounds, statements obtained from defendant by police officers; (3) that trial counsel failed to adequately prepare for trial in that he took no depositions of any witnesses, failed to discuss trial strategy with the defendant, and failed to contact and call to testify witnesses provided to defense counsel by defendant; (4) that trial counsel "failed to object to testimony of defendant's witness Randy Sabin when said witness revealed that the prosecutor had phoned Sabin and questioned him on the pretense that the prosecutor was defendant's attorney"; and (5) that trial counsel failed to object to the prosecutor's questions of defendant relating to his prior criminal record.

The general rules in considering appeals from the denial of postconviction relief are that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal, that a defendant seeking postconviction relief has the burden of establishing a basis for such relief, and that the findings of the district court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Rivers, supra; State v. Evans*, 224 Neb. 64,

395 N.W.2d 563 (1986); *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

With specific regard to the issue of relief sought on the basis of ineffective counsel, this court has adopted a two-part test: first, the attorney must perform at least as well as an attorney in the area with ordinary skill in criminal law; and, second, the attorney must conscientiously protect the defendant's interests. In addition, the defendant must show that in the absence of the attorney's error, there is a reasonable probability that the result would have been different. *State v. Rivers, supra; Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We reserve consideration of defendant's first claim. With regard to defendant's second claim concerning defendant's statement, the record shows that at the time of the police interview with defendant, he was not under arrest nor in custody; and the record also shows that the statement was not used in the prosecution's case in chief, but only in remote impeachment as to whether defendant had said he had "nothing against them [the schools]." Defendant's objection in this contention is without any merit.

With regard to defendant's third contention, that his counsel failed to properly investigate and adequately prepare for trial, the record shows that counsel ably represented defendant in a lengthy preliminary hearing, in which six prosecution witnesses testified and were thoroughly cross-examined. Before trial, defendant's counsel presented two motions in limine, which were both granted by the trial court. The police reports were examined by counsel and by defendant. During the trial, defendant's counsel vigorously cross-examined all the prosecution witnesses and presented four witnesses and the defendant as witnesses for the defense. With regard to the alleged failure to call other witnesses, examination of the record shows that the witnesses whom defendant has now identified as those who should have been called would probably not have been helpful to defendant and, in some cases, might well have further damaged his cause. Further, the decision to call, or not call, witnesses is a matter of trial strategy and within counsel's judgment. *State v. Evans, supra; State v. Lofquest*, 223 Neb.

87, 388 N.W.2d 115 (1986). Defendant's contention in this regard is without merit.

Defendant's fourth contention is that counsel did not object to the form of questions directed by the prosecutor to Randy Sabin, a witness called by defendant. On impeachment cross-examination this witness displayed confusion as to who had called him on the telephone before the trial. No prejudice could be deduced from this witness' confusion.

Defendant's fifth contention as to the ineffectiveness of his trial counsel raises the question of trial counsel's failure to object to the prosecutor's questions to defendant concerning defendant's past criminal record. The contention is without merit. The prosecutor merely established in five questions that defendant admitted he had been convicted of two felonies in the 10 years preceding the trial. Such questions were perfectly proper.

Defendant's first claim presents a different situation. It is settled law that, on postconviction appeals, this court generally does not consider issues that could have been raised on a direct appeal and that the burden is on a defendant seeking postconviction relief to allege facts which show he is entitled to such relief. In this case we are asked to consider the issue that defendant's counsel was ineffective in that he did not file a motion to suppress evidence vital to the State's case against defendant and did not object to the receipt of that evidence at trial on the basis it had been unconstitutionally seized from defendant. The resolution of that issue cannot be made until the facts of defendant's arrest, and subsequent search of his car, are known to this court. Review of a criminal case under our rule 3B does not determine such facts. For that question to be submitted to this court in a proceeding under rule 3B, defendant's counsel would have to attack his own performance and to allege and show that he had been ineffective.

If the allegations in a postconviction motion as to ineffective counsel can be disposed of by a consideration of the record—as is the case in the other four contentions in defendant's postconviction motion and brief in this case—there is no need for an evidentiary hearing. Consideration of the record before us does not give us an answer to defendant's first contention.

The facts concerning the defendant's arrest, as shown by the files and records, are almost completely unknown to this court. Defendant's amended postconviction petition, while not as artful as it might be, is sufficient to raise the issue of the lawfulness of his arrest. Defendant alleges an illegal search. The files and records of the case do not show that "defendant is entitled to no relief." If defendant can establish his allegations, he might be entitled to relief.

There may well be an explanation of the arrest in the files or records of the trial court which shows clearly that the arrest was proper and that counsel did not challenge the receipt of the seized items as a matter of strategy. The record before us, however, shows only that defendant was arrested at 40th and Van Dorn Streets in Lincoln, Nebraska. No arrest warrant or search warrant is mentioned. The State, in its brief at 4, states: "No pretrial motion was made to suppress this evidence [the items seized from defendant's car which were later identified as the same items taken from the schools]." No objection was made at the trial as to the receipt of those items, except on the basis of identification.

Defendant should be afforded an evidentiary hearing on the sole issue of the seizure of the knife and handcuffs from defendant's automobile at the time of his arrest. The cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

It is fundamental that an application for postconviction relief must allege facts which, if true, would entitle the prisoner to relief.

> In a proceeding under the Post Conviction Act, the appellant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and alleging mere conclusions of fact or of law are [sic] not sufficient to require the court to grant an evidentiary hearing.

(Syllabus of the court.) *State v. Russ*, 193 Neb. 308, 226 N.W.2d 775 (1975).

The amended motion to vacate and set aside judgment and

sentence filed by the defendant is a 10-page "shotgun" type pleading. Paragraph 4 alleges that exhibits Nos. 22 (pocketknife) and 24 (handcuffs) were obtained "by way of an illegal search" by arresting officers. No fact is alleged which would explain why the defendant contends the search was illegal. More importantly, no fact is alleged which might be the basis for a contention that the arrest was illegal.

If a hearing is to be granted upon the basis of a pleading such as that filed in this case, then there is no longer a requirement that an application for postconviction relief plead *facts* as distinguished from conclusions.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. JOHN GOLDEN, APPELLEE AND CROSS-APPELLANT.

415 N.W.2d 469

Filed November 20, 1987. No. 86-1019.

Pleas. Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

George Rhodes, Custer County Attorney, for appellant.

Steven O. Stumpff of Stumpff Law Office, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Appellee, John Golden, was charged in two counts with assaulting an officer in the third degree, Neb. Rev. Stat. § 28-931(1) (Reissue 1985), a Class IV felony, and with using a firearm to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1985), a Class III felony. Golden entered pleas of guilty

to both charges, and he was sentenced to 3 years' probation subject to conditions including 90 days in jail.

The State appeals this sentence, pursuant to Neb. Rev. Stat. §§ 29-2320 to 29-2325 (Reissue 1985), assigning these errors: (1) The court erred in failing to impose two consecutive sentences upon the defendant, and (2) the sentence imposed was excessively lenient.

Golden cross-appeals, assigning as error that the trial court failed to advise him that, according to § 28-1205(3), the sentence for using a firearm to commit a felony must be served consecutively to any other sentence.

Briefly, the facts were that Golden, age 56 years, had a history of alcoholism accompanied by physical violence. In the late evening of June 25, 1986, Golden became intoxicated at his home in Broken Bow, Nebraska; he quarreled with his wife and struck her; and she summoned the police. Golden's recollection of later proceedings is vague. Then followed a full-scale scenario of a SWAT-team-type standoff and arrest of Golden, including his threatening the officers with a gun and statements such as "stay there or I'll drop you," "I've got a dead shot at you," and "I'm going to take one of you, I'm going to take you all." Golden was forcibly arrested, and two officers were bruised and scratched.

Golden was originally charged with seven felonies which, after a plea bargain including his agreement to enter guilty pleas, were reduced to the two felonies involved here.

We first consider Golden's cross-appeal, which is essentially that his guilty pleas were involuntary. At the November 13, 1986, arraignment, the judge conducted a lengthy and detailed explanation of Golden's constitutional rights that he would waive in the event of his guilty pleas to the two charges, as provided in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The lone exception was an error in the explanation of the maximum possible penalties that might be imposed, which was critical, since in the event of Golden's conviction of the crime of using a firearm to commit a felony, the provision in § 28-1205(3) that "sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed" is a mandate to a sentencing court to impose a consecutive

sentence. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary. See, *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983); *People v Woeltje*, 112 Mich. App. 699, 317 N.W.2d 230 (1982).

The judge explained that the penalty for third degree assault on an officer was "a maximum sentence of 5 years in prison or $10,000 fine or both and there is no minimum" and that using a firearm to commit a felony carries "a maximum sentence of 20 years in prison or $25,000 fine or both and there is a minimum of one year imprisonment." He further explained that he could impose the sentences "concurrently or consecutively." Golden was not informed that § 28-1205(3) mandated a consecutive sentence.

Since Golden was misinformed concerning the mandatory requirement of a consecutive sentence, § 28-1205(3), and the record does not otherwise affirmatively show that he understood that statutory requirement, and since the guilty pleas to the two related separate charges were the result of plea bargaining, we conclude that both pleas of guilty were involuntary and that both convictions should be set aside. This cause is remanded for further proceedings consistent with this opinion.

It is not intended that this disposition is a response to the unanswered question presented in *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986).

It is not necessary to discuss appellant's assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DUANE P. O'NEILL, APPELLANT.
415 N.W.2d 470

Filed November 20, 1987. No. 86-1078.

Courts: Records: Appeal and Error. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Earl D. Ahlschwede of Ahlschwede, DeBacker & Truell, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The appellant, Duane P. O'Neill, was charged with the offense of operating a motor vehicle while under the influence of alcohol or when he had ten-hundredths of 1 percent of alcohol in his body fluid. Neb. Rev. Stat. § 39-669.07 (Reissue 1984). In the same count, the appellant was alleged to have twice previously been charged with and convicted of a violation of § 39-669.07.

On June 11, 1986, a Hall County Court jury found the appellant guilty of the principal offense. The court accepted the verdict and set a sentencing date for July 17, 1986, at 9:30 a.m. O'Neill appealed the county court's decision to the district court for Hall County. The district court affirmed, and O'Neill now appeals the decision of the district court affirming the decision of the county court.

We do not know what was before the district court, but the transcript here presented does not contain a copy of the sentencing judgment or sentencing proceedings, if any. In order for the district court to review, on appeal, the decision of the county court, it was necessary that there should be before the district court the judgment pronounced by the county court.

The appellant must present to this court a record of the judgment reviewed by the district court to enable this court to review its action. *Goldsmith v. Wix*, 43 Neb. 573, 61 N.W. 718 (1895). There being no county court judgment in the record here presented, the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO L. NEWSON, JR., APPELLANT.
415 N.W.2d 471

Filed November 20, 1987. No. 87-128.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

CAPORALE, J.

Pursuant to the jury's verdicts, defendant, Leo L. Newson, Jr., was adjudged guilty of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985) and of using a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). He appeals and assigns as his sole error the trial court's determination that the evidence is sufficient to sustain

the jury's verdicts. We affirm.

On the afternoon of June 26, 1986, Anton Poggenpohl and his wife, Deborah, were at their vacuum cleaner retail sales store at 6065 Ames Avenue in Omaha. While Mr. Poggenpohl was talking on the telephone, he noticed a man walk into the store at about 3:45 p.m. and look at some vacuum cleaners. While both of the Poggenpohls glanced at the man, neither of them paid much attention to him, thinking he was a customer on whom Mr. Poggenpohl would wait as soon as he finished his telephone conversation. When Mr. Poggenpohl approached the man, the latter demanded money and pointed an object draped with an orange-red dish towel, which he held in his right hand, at Mr. Poggenpohl's stomach. At first, Mr. Poggenpohl thought the matter was a joke, but changed his mind after he reached out, touched the towel, saw a barrel, and realized the object in the man's hand was a gun. Because there was no cash register, Mr. Poggenpohl gave the robber $75 to $100 from his wallet. The robber then turned and left through the front door of the store. Both Mr. Poggenpohl and his wife, who had been watching the 30- to 45-second confrontation from behind the counter, went out the front door to see where the robber had gone, but he was not in sight. Mrs. Poggenpohl then called the police.

Defendant is 6 feet 2 inches tall and weighs 175 pounds. According to the police report, Mrs. Poggenpohl said the robber was 5 feet 9 inches tall and weighed 160 pounds; however, Mrs. Poggenpohl testified she told the police the robber was over 6 feet tall and that the report was incorrect in the description attributed to her. Mr. Poggenpohl told police the robber was 5 feet 11 inches tall and weighed 160 pounds. However, at the preliminary hearing Mr. Poggenpohl testified that the robber weighed 190 pounds. According to Mr. Poggenpohl, the robber wore faded jeans, a T-shirt, and tennis shoes.

On June 30, 1986, Police Officer James Reuting showed the Poggenpohls 48 photographs, which they viewed independently of each other. Mrs. Poggenpohl said she was "pretty sure" the photograph of the defendant depicted the man who had robbed them. Mr. Poggenpohl identified the

defendant from the same photograph, saying he was "about ninety percent sure" and "[t]hat's the one that looked a lot like the guy that robbed us."

On July 15, 1986, at approximately 11 p.m., Police Officer John Skanes had occasion to stop a vehicle near Phil's Foodway store at 30th Street and Ames Avenue in Omaha. He asked the driver for his operator's license, but the driver, who identified himself as Danny Robinson, could not produce one. A second officer arrived later, recognized the driver as the defendant, and informed Skanes that a felony warrant had been issued for defendant's arrest.

On July 16, 1986, the Poggenpohls viewed a lineup independently of each other, and each identified defendant as the man who had robbed them. During the course of the trial, each of the Poggenpohls again identified defendant as the robber.

Defendant called three witnesses at trial. The first of these, Cheryl Jones, testified that she saw the defendant in the early morning of June 26, 1986, because he had spent the night at her home, at 4301 Boyd Street. According to Jones, the pair left her home sometime around 12 noon and went to a body shop. They then left the body shop for the home of defendant's sister, Neona Newson, arriving there at approximately 1:45 p.m. They left Ms. Newson's home at approximately 2 p.m. for Phil's Foodway so that defendant could purchase a birthday card for his mother. Defendant then dropped Jones off at her home at approximately 2:30 p.m. Jones also testified that defendant had cashed a $475 check he had received as a settlement for a car accident 2 days earlier and that defendant told her he had money from an unemployment check he had previously received. According to her, defendant was wearing a white shirt, white pants, and red, white, and black tennis shoes on that day.

Ms. Newson testified that Jones and the defendant had arrived at her home on June 26 at approximately 2 p.m. and left 10 to 15 minutes later for Phil's Foodway so that defendant could buy a birthday card for their mother.

Defendant's mother, Verna Louise Swan, testified that defendant arrived at her home on June 26, 1986, at

approximately 3:25 or 3:30 p.m. and brought her $20, enclosed in a birthday card, and a carton of cigarettes. Defendant then went to a local store and brought back beer, some of which he and his mother shared. According to Swan, defendant left her home at 4 p.m. or later. She remembered the date because it was 1 week after her birthday. Swan confirmed Jones' description of the clothing defendant was wearing on the day of the robbery.

Defendant testified that after he left Jones at her home at approximately 2:20 p.m., he picked up three individuals and purchased beer, arriving then at his mother's home at 3:15 or 3:30 p.m. He left his mother's home at 3:50 or 4 p.m., and the four went to a park at 20th and Pinkney Streets where they drank and socialized with other friends. The defendant also testified that the reason he had given Officer Skanes a false name when he was stopped on July 15, 1986, was because he had been convicted for driving while intoxicated and was at that time driving on a suspended license.

This case is controlled by the well-settled rule that in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Charron, post* p. 871, 415 N.W.2d 474 (1987); *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987).

The testimony of the Poggenpohls more than adequately supports the jury's findings of guilt; the Poggenpohls separately and independently of each other identified defendant, both from photographs and from seeing him in a lineup, as the man who had robbed them. Each also identified him at trial. These identifications are not rendered unbelievable as a matter of law because of the discrepancies in the Poggenpohls' earlier descriptions.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH R. CHARRON, APPELLANT.

415 N.W.2d 474

Filed November 20, 1987. No. 87-175.

1. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
2. **Sexual Assault.** In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact.
3. **Sexual Assault: Proof.** Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant was convicted of third degree sexual assault, sentenced to 90 days in jail, and fined $500. Upon appeal to the district court the judgment was affirmed. Upon appeal to this court the defendant contends the evidence was insufficient to support the conviction.

> In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is

sufficient evidence to support the conviction.

State v. Williams, ante p. 647, 648, 413 N.W.2d 907, 908 (1987); *State v. Duff, ante* p. 567, 412 N.W.2d 843 (1987); *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987).

Sexual assault, third degree, is defined in Neb. Rev. Stat. § 28-320 (Reissue 1985):

> (1) Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree.
>
> . . . .
>
> (3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

Sexual contact is defined in Neb. Rev. Stat. § 28-318 (Reissue 1985) as:

> (5) Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or *the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts.* Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. *Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.*

(Emphasis supplied.)

In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact. *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986).

The record shows that on June 4, 1986, at about 12 noon, the victim and her 2-year-old son were at the Sears store in the Crossroads shopping center in Omaha, Nebraska. The victim's car was parked on the store's west side, in front of the package

pickup portion of the store. While she was leaning into the back seat and placing her child in his carseat, the victim was grabbed from behind. She described the incident in the following manner: "He grabbed my rear end really hard forcibly with his hand and pushed and hurt, and especially with one finger." The victim testified that the touching was "on the outside of my clothing" and that the assailant's hand pushed on her vaginal area, causing pain.

Immediately following the incident, the victim turned around and saw the defendant walk across the parking lot. The victim testified that as the defendant walked away after the incident, his head was bouncing and he was laughing.

The victim followed the defendant until he reached his car, which was parked at the western end of the parking lot. The victim wrote down the license number of the defendant's car and reported the license number to the police, as well as descriptions of his person and his car. Later, the victim identified the defendant in a photographic lineup and at the trial.

The license number was traced to the defendant, and he was called to police headquarters concerning the June 4 incident. The defendant admitted that he had been in the parking lot of Children's Palace, a store located immediately to the west of the Sears parking lot, but denied having been in Sears' parking lot and denied any involvement in the incident described by the victim.

The defendant contends that the evidence failed to show that his conduct in touching the victim could be "reasonably construed as being for the purpose of sexual arousal or gratification of either party" as required by the statute.

The statute does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose. The act of the defendant in grabbing a woman from behind, pressing forcefully in the vaginal area, and then walking away, laughing and bobbing his head, were circumstances from which the trial court could find that the conduct of the defendant was for the purpose of his sexual arousal or gratification.

The evidence was sufficient to support the finding of guilty,

and the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF COREY RICHTER, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. COREY RICHTER, APPELLANT.
415 N.W.2d 476

Filed November 20, 1987. No. 87-256.

1. **Criminal Law: Statutes.** While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **Criminal Law: Words and Phrases.** "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
4. **Words and Phrases.** The word "physical" describes that which has material, substantive, and objective existence.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Douglas Warner, Deputy Scotts Bluff County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The county court sitting as a juvenile court found that the juvenile, Corey Richter, violated the provisions of Neb. Rev. Stat. § 28-906(1) (Reissue 1985) by obstructing peace officers, as a consequence of which the court had jurisdiction pursuant to the provisions of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1986). The county court thereupon committed Richter to the

care and custody of the Department of Correctional Services for placement at the Youth Development Center-Kearney. Richter then appealed to the district court. That court affirmed the judgment of the county court, and Richter appealed to this court. His assignment of error questions the sufficiency of the evidence to support a finding that he obstructed the officers. We affirm.

Section 43-247(1) provides that the juvenile court shall have jurisdiction of any juvenile "who has committed an act . . . which would constitute . . . an infraction under the laws of this state . . . ." Section 28-906(1) provides that one

> commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he intentionally obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer . . . acting under color of his official authority.

Richter had been staying with his grandmother who, on October 20, 1986, asked the police to remove him from her home. Officers Mike Brunz and Douglas French, both in uniform, went to the grandmother's home in a marked police car to so do. As they approached the home, they could hear Richter arguing with and cursing and yelling at his mother. Officer French told Richter they were going to take him to a youth shelter for the evening. Richter ran away as the officers were escorting him to their automobile. Officer French then pursued Richter on foot, but lost sight of him. The officers found Richter approximately an hour later near his grandmother's home. Upon seeing the officers Richter started to flee again, but returned peacefully after his mother yelled for him to stop. No physical restraints were ever placed on Richter, nor did Richter ever resort to force.

Richter first argues he did not violate § 28-906(1) for the reason that the officers were engaged neither in enforcing the penal law nor in preserving the peace. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987);

State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986). Moreover, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). "Preservation of the peace," as used in § 28-906(1), means maintaining the tranquillity enjoyed by members of a community where good order reigns. See *State v. Sukovaty*, 178 Neb. 779, 135 N.W.2d 467 (1965). It can hardly be said that officers engaged in removing from the scene one who was arguing with and yelling and cursing at his mother were not engaged in preserving the peace, irrespective of what brought them to the scene in the first instance. Since obstructing an officer engaged in preserving the peace constitutes a violation of § 28-906(1), we need not consider whether the officers were at the same time enforcing the penal law.

Richter next argues that in order to establish a violation of § 28-906(1), the State must establish that he used, or threatened to use, some physical means to thwart the officers; that simply running away is not such an act and therefore does not violate the statute.

While cases from other jurisdictions can be found which hold that flight alone violates similar statutes, *State v. Jarvis*, ____ W. Va. ____, 310 S.E.2d 467 (1983), and *Tankersley v. State*, 155 Ga. App. 917, 273 S.E.2d 862 (1980), and which suggest to the contrary, *People v Landrie*, 124 Mich. App. 480, 335 N.W.2d 11 (1983), *disavowed on other grounds People v Wells*, 138 Mich. App. 450, 360 N.W.2d 219 (1984), they are not particularly helpful, for each statute employs different language. To the extent relevant to this case, § 28-906(1) prohibits the use or threat of "violence, force, physical interference, or obstacle" which intentionally "obstructs, impairs, or hinders" the preservation of the peace. Even if the word "physical" modifies "obstacle," as well as "interference," the act of running away was a "physical" obstacle in the sense that it was an act which had material, substantive, and objective existence. *Clemmons v. Insurance Co.*, 2 N.C. App. 479, 163 S.E.2d 425 (1968); Webster's Third New International Dictionary, Unabridged 1706 (1981). Since the physical obstacle interposed by the act of running away

obstructed, impaired, or hindered the officers' efforts to preserve the peace, Richter committed an infraction of a law of this state, and the juvenile court had jurisdiction over him.

AFFIRMED.

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, APPELLANT, V. MARLEN JOHNSON, APPELLEE.

415 N.W.2d 478

Filed November 20, 1987. No. 87-495.

1. **Judgments: Final Orders: Appeal and Error.** There can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken.
2. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
3. **Judgments: Final Orders.** A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Appeal dismissed.

Gregory N. Lohr, for appellant.

Rodney R. Smith of Smith & Boyd, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Dixon County. The district court sustained the demurrers of defendant to plaintiff's November 21, 1986, petition and to the two amended petitions which followed.

The Federal Land Bank of Omaha's petitions alleged, in essence, that it had a security interest in crops grown on real estate owned by defendant Marlen Johnson's brother. The security interest allegedly arose pursuant to a real estate

mortgage held and recorded by The Federal Land Bank, which encumbered real estate owned by Johnson's brother and sister-in-law.

Appellant further alleged that Johnson was the assignee of his brother's interest in the above-mentioned crop and that Johnson harvested and disposed of at least part of the crop without the consent or knowledge of The Federal Land Bank. Appellant sought a judgment against Johnson for the value of its interest in the crop, since it had previously foreclosed on the real estate mortgage and the proceeds were insufficient to satisfy the debt. Appellant alleges that its security interest in the crop is superior to that of Johnson.

The district court sustained Johnson's demurrers for failure to state a cause of action in the original petition and two amended petitions. The last order of the lower court, entered on April 27, 1987, and filed May 1, reads, in part, as follows:

> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that Defendant's Demurrer to Plaintiff's Second Amended Petition should be and the same is hereby sustained.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff be and it hereby is allowed ten days in which to further amend its Petition and upon Plaintiff's failure to so amend, this matter shall be automatically dismissed at Plaintiff's cost.

The record before this court reveals no further order or judgment from the district court in this matter.

Appellant elected to prosecute an appeal from the April 27 order rather than to amend its petition. Appellant's actions are premature. It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken. *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986). A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987).

The April 27 order of the district court was not a "final determination of the rights of the parties" as contemplated by

Neb. Rev. Stat. § 25-1301 (Reissue 1985). The order was conditional in that *if* appellant had amended its petition, the case would have continued. As this court noted in *Lemburg v. Adams County, supra* at 292, 404 N.W.2d at 431, "a conditional judgment is wholly void because it does not 'perform in praesenti' and leaves to speculation and conjecture what its final effect may be." Quoting from *Wallace v. Hankins*, 541 S.W.2d 82 (Mo. App. 1976).

The April 27 conditional order of the district court was not a final judgment, and an appeal cannot be taken therefrom.

APPEAL DISMISSED.

ROBERT J. LUBY AND PATRICIA A. LUBY, APPELLANTS, V. CBS REAL ESTATE COMPANY ET AL., APPELLEES.

415 N.W.2d 480

Filed November 20, 1987. No. 87-807.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for further proceedings.

Debra R. Nickels of Welsh & Sibbernsen, for appellants.

Richard E. O'Toole of Walentine, O'Toole, McQuillan & Gordon, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The plaintiffs-appellants, Robert J. and Patricia A. Luby, allege they were damaged by the conduct of defendants-appellees, CBS Real Estate Company, Madeline Begley, and Jeannie Neff. The district court sustained the demurrer of the defendants on the basis that as real estate professionals they were entitled to the protection of the 2-year period of limitations applicable to professionals, embodied in Neb. Rev.

Stat. § 25-222 (Reissue 1985). *Tylle v. Zoucha, ante* p. 476, 412 N.W.2d 438 (1987), holds that real estate brokers are not professionals within the meaning of that statute. Accordingly, the judgment of the district court is hereby reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KAREN L. BARD, APPELLANT, V. COX CABLE OF OMAHA, INC., A NEBRASKA CORPORATION, AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEES.

416 N.W.2d 4

Filed November 25, 1987. No. 85-526.

1. **Demurrer.** In considering a demurrer, a court accepts as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Quo Warranto: Franchises.** Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
3. **Public Utilities: Rates: Actions.** In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
4. **Municipal Corporations: Rates: Actions.** Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
5. _____: _____: _____. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
6. **Constitutional Law: Rates: Actions.** Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
7. **Telecommunications: Rates: Actions.** The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
8. **Demurrer: Pleadings: Actions.** Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

J. Patrick Green, Martin A. Cannon, and Larry W. Myers, for appellant.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman, and Brent N. Rushforth and James M. McElfish, Jr., of Dow, Lohnes & Albertson, for appellee Cox Cable.

Herbert M. Fitle, Omaha City Attorney, and Timothy M. Kenny, for appellee City of Omaha.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Plaintiff-appellant, Karen L. Bard, seeks an adjudication under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), that the community antenna television service franchise granted by the defendant-appellee City of Omaha to the defendant-appellee Cox Cable of Omaha, Inc., a Nebraska corporation, is void or, in the alternative, that the rates set by the city and charged by Cox Cable are excessive, and for other relief. The district court, after sustaining the separate demurrers of the city and of Cox Cable, dismissed Bard's amended petition. The five errors which Bard assigns to the district court's order of dismissal merge to challenge the district court's determinations that (1) she lacks the capacity to sue, (2) the court lacks subject matter jurisdiction, and (3) she has failed to state a cause of action. We reverse and remand for further proceedings.

This is the third suit concerning the Omaha-Cox Cable franchise to find its way to this court, the other two being *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982), and *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982). In this third suit Bard alleges that in March of 1980 Cox Cable and five other applicants, pursuant to invitation, submitted to the city their proposals for providing

community antenna television service to the city's residents. After holding public hearings, the city council adopted an ordinance granting a 15-year franchise to Cox Cable, pursuant to which the city's mayor signed a franchise agreement with Cox Cable in September of 1980.

In order to induce the city to award it the franchise, Cox Cable represented that it would include in its service a feature called "Interactive Data Exchange" (INDAX), which would allow users to bank, shop, check travel schedules, play games, and access various data sources. However, contrary to Cox Cable's statements and representations, INDAX did not then exist, Cox Cable knew it did not exist, and no such service presently operates anywhere. Each of the five city council members who voted for the franchise publicly stated that Cox Cable's representations regarding INDAX and the promise to deliver INDAX service were the factors which convinced him to vote in favor of awarding the franchise to Cox Cable. Even though Cox Cable's other services were not as high in quality as those proposed by the other companies, the promised INDAX service would have rendered Cox Cable's proposal superior in quality to the others and would have justified acceptance of the Cox Cable proposal, notwithstanding the fact its rates were in excess of those proposed by the other applicants.

The operative petition further alleges that (1) other than INDAX, the quality of services offered by the other applicants was equal to or better than that offered by Cox Cable; (2) the rates proposed by the other applicants were 5 to 20 percent lower than those charged by Cox Cable; (3) the services actually offered by Cox Cable are not as numerous, or as varied, as the services proposed by the other applicants; and (4) the rates approved by the city council under the franchise agreement are between 10 and 30 percent higher than rates charged by "other comparable CATV companies for comparable services in cities of comparable size elsewhere in the United States." The petition also asserts that Bard has subscribed to and paid for the services provided by Cox Cable since 1982. The petition concludes that the Cox Cable rates are excessive and unreasonable in violation of Neb. Rev. Stat. § 18-2201 (Reissue 1983), the due process clause of the 14th amendment to the U.S. Constitution, and

Neb. Const. art. I, §§ 1, 3, 16, 21, and 25.

Prior to filing this action, Bard, through her attorneys, on November 18, 1983, wrote the city a letter asking that public hearings be held to review Cox Cable's franchise and rates. The letter advised that if notice of such hearings was not received within 10 days, judicial relief would be sought. This letter referred to and incorporated a June 8, 1983, letter sent to the city by the same attorneys on behalf of another subscriber. That earlier letter also asked that the matter of Cox Cable's franchise and rates be put on the city council's agenda within 30 days. The city took no action in response to either letter.

Thus, Bard undertook to state two causes of action. The first seeks to void the franchise on the ground it was procured by fraud. The second seeks a judicial review of rates which are alleged to be arbitrary and unreasonable.

The city and Cox Cable each demurred pursuant to the provisions of Neb. Rev. Stat. § 25-806 (Reissue 1985), which provides that a defendant may demur to a petition when it appears from the face thereof that, among other things, (1) the plaintiff lacks legal capacity to sue, (2) the court lacks subject matter jurisdiction, or (3) the petition fails to state a cause of action. The five bases upon which each demurrer rests combine to assert the existence of each of the foregoing three statutory grounds, which parallel the findings made by the district court and correlate to the assignments of error presented by this appeal. Neither demurrer rests on the claim that several causes of action are improperly joined, also a statutory ground.

Because this case was decided by the district court on demurrers, we are required to accept as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but we do not accept as true the conclusions of the pleader. *Ambroz v. Cornhusker Square Ltd., post* p. 899, 416 N.W.2d 510 (1987); *Slusarski v. County of Platte, post* p. 889, 416 N.W.2d 213 (1987); *Knoell v. Huff,* 224 Neb. 90, 395 N.W.2d 749 (1986); *Midwest Messenger Assn. v. Spire,* 223 Neb. 748, 393 N.W.2d 438 (1986).

In connection with the first assignment of error, the finding that Bard lacks the capacity to sue, we concern ourselves first

with the prayer that the franchise be declared void.

The long-settled law of this jurisdiction is that, absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto. Neb. Rev. Stat. §§ 25-21,121 et seq. (Reissue 1985); *Clark v. Interstate Independent Telephone Co.*, 72 Neb. 883, 101 N.W. 977 (1904). No facts are pled from which it can be concluded that there has been an illegal expenditure of public funds or that taxes are affected. Thus, Bard lacks the legal capacity to maintain this action for the purpose of challenging the validity of the franchise.

As a subscriber to the franchise services, Bard has a special interest in the rates she pays and would benefit by a reduction of those rates. Thus, she alleges a special injury peculiar to herself aside from and independent of that suffered by the nonsubscribing general public. See, *Reimer v. KN Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982).

We have also said that before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality. *Hall v. Cox Cable of Omaha, Inc., supra.* The rule is analogous to that employed in derivative actions by stockholders against private corporations. *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983); *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955). One might argue that the 10-day period specified in Bard's November 18, 1983, letter was unreasonably short, particularly in view of the circumstance that the period included two weekends and the Thanksgiving holiday. However, the fact the city made no response to a similar June 8, 1983, letter leads to the conclusion that the city would not have responded to Bard's letter no matter what time limit was set. Just as in a derivative action against a corporation a stockholder is excused from making a demand upon the corporation if such would be unavailing, *Anderson v. Clemens Mobile Homes, supra*, so, too, is one excused from making a

futile demand upon a municipality. *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 P. 826 (1899). Under the circumstances the 10-day demand upon the city was adequate.

We therefore conclude that Bard has the capacity to maintain this action insofar as it seeks a review of the rates she pays.

Consequently, with respect to the matter of rates, we reach the second assignment, that the district court erred in finding it lacked subject matter jurisdiction.

Section 18-2201 provides:

> The furnishing of community antenna television service is hereby declared to be a business affected with such a public interest that it must be regulated locally. All municipalities in Nebraska are hereby authorized and empowered, by ordinance, to regulate, to prohibit, and to consent to the construction, installation, operation, and maintenance within their corporate limits of all persons or entities furnishing community antenna television service. All municipalities, acting through the mayor and council or board of trustees, shall have power to require every individual or entity offering such service, subject to reasonable rules and regulations, to furnish any person applying therefor along the lines of its wires, cables or other conduits, with television and radio service. The mayor and council or board of trustees shall have power to prescribe reasonable quality standards for such service and shall regulate rate increases so as to provide reasonable and compensatory rents or rates for such service including installation charges. In the regulation of rate increases the procedure provided in section 18-2206 shall be used in any franchise granted or renewed after May 23, 1979. Such person or entity furnishing community antenna television service shall be required to carry all broadcast signals as prescribed by franchise and permitted to be carried by Federal Communications Commission regulations during the full period of the broadcast day of its stations.

Prior to its amendment in 1979, the pertinent language of § 18-2201 (Reissue 1977) provided that the "mayor and council or board of trustees shall have power to . . . regulate and fix

reasonable and compensatory rents or rates . . . ." 1969 Neb. Laws, ch. 119, § 1, p. 536-37. Thus, we agree with the district court's conclusion that any statutory authority it might have to review rates is limited only to the matter of rate increases. Since the suit is addressed to the rates as initially set rather than to an increase thereof, Bard has not stated a cause of action under the provisions of § 18-2201 (Reissue 1983).

Bard further alleges, however, that Cox Cable's rates violate the due process clause of the 14th amendment to the U.S. Constitution and several provisions of the Nebraska Constitution, including the due process clause contained in article I, § 3, thereof. The constitutional argument she makes limits itself to those due process clauses, and we, therefore, likewise limit our analysis to due process concerns.

Because the setting of rates for a regulated industry is a legislative act, the courts of this state lack the power to set rates. See *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N.W. 171 (1898). The courts do, however, have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law. See, *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975); *Nebraska Telephone Co. v. State, supra; Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 495 P.2d 885 (1972); *Holton Creamery Co. v. Brown*, 137 Kan. 418, 20 P.2d 503 (1933); *Kiefer v. City of Idaho Falls*, 49 Idaho 458, 289 P. 81 (1930).

Thus, in the absence of overriding federal law, the district court possesses subject matter jurisdiction to determine whether Cox Cable's rates are so arbitrary and unreasonable as to be confiscatory.

The question at this point therefore becomes whether there exists any overriding federal law which divests the state courts of subject matter jurisdiction. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), provides, at § 543(c) (Supp. II 1984):

> In the case of any cable system for which a franchise has

been granted on or before the effective date of this subchapter [December 29, 1984], until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

The relevant regulations promulgated under the act, specifically 47 C.F.R. § 76.33 (1986), provide in part:

(a) A franchising authority may regulate the rates of a cable system granted a franchise after December 29, 1984, and any cable system after December 29, 1986, subject to the following conditions:

(1) Only basic cable service as defined in § 76.5(pp) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. . . .

(3) A cable system once determined to be subject to effective competition shall not be subject to regulation for one year after any change in market conditions which would cause it to be determined not to be subject to effective competition.

(4) A cable system may automatically pass through to the basic service rate without franchising authority approval cost increases that are readily identifiable and entirely attributable to the provision of basic service. Rate increases of this type may be taken in addition to the automatic 5% annual rate increase to which the cable system may be entitled under the Title VI of the Communications Act.

(b) For franchises granted on or before December 29, 1984, a franchising authority may, until December 29, 1986, to the extent provided in the franchise agreement:

(1) Regulate the rates for the provision of basic cable service;

(2) Require the provision of any tier of service without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); and

(3) Regulate the rates for the initial installation or the rental of one set of the minimum equipment necessary to receive basic cable service.

(c) Any state or local law in existence on December 29, 1984, which limits or preempts regulation of rates for cable service by any franchising authority shall remain in effect until December 29, 1986, to the extent that it provides for such limitation or preemption.

(d) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall: (1) Give formal notice to the public; (2) provide an opportunity for interested parties to make their views known, at least through written submissions; and (3) make a formal statement (including summary explanation) when a decision on a rate matter is made.

(e) Any party may petition the Commission for relief of the provisions in this section in accordance with the provisions and procedures set forth in § 76.7 for petitions for special relief.

We conclude therefrom that the Cable Communications Policy Act of 1984 does not preclude state judicial review of the rates Cox Cable charged Bard from the date of filing of this action to December 29, 1986. What authority the city retains to regulate rates after that date, and thus for the courts of this state to review, cannot be determined at this stage of the proceedings.

Since Bard has the capacity to sue for the purposes of reviewing Cox Cable's rates, and the state district court, at the least, possesses subject matter jurisdiction to review the rates charged prior to December 29, 1986, we must address Bard's third and last assignment, that the district court erred in finding she failed to state a cause of action.

In making this determination we are guided by the principle

that pleadings in ordinary actions are to be liberally construed, and if with such a construction a petition states a cause of action, a demurrer is to be overruled. See, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984); *Northport Irrigation District v. Farmers Irrigation District*, 125 Neb. 607, 251 N.W. 174 (1933).

The crucial allegations for the purpose of determining whether a cause of action has been stated are that Cox Cable promised to deliver services it does not and cannot deliver, and that its charges are as much as 30 percent higher than those otherwise available. These allegations support an inference that Cox Cable's subscribers are paying a rate which includes a charge for something that is not being delivered to them and that, to that extent, the rate is arbitrary and unreasonable such as to be confiscatory and therefore in violation of the due process clauses of the state and federal Constitutions. Thus, Bard has stated a cause of action for judicial review of the rate set by the city. Whether the evidence will prove her allegations is a different question, to be decided at another time.

For the reasons hereinabove stated, the district court's judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., and GRANT, J., not participating.

MARION SLUSARSKI AND CONRAD SLUSARSKI, APPELLANTS, V. COUNTY OF PLATTE, NEBRASKA, AND COUNTY OF MERRICK, NEBRASKA, APPELLEES.

416 N.W.2d 213

Filed November 25, 1987. No. 86-017.

1. **Demurrer: Pleadings.** Pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled.
2. _____: _____. A demurrer which challenges the sufficiency of the allegations

is a general one.

3. _____: _____. In ruling on a general demurrer, a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
4. **Waters.** Diffused surface waters which collect and concentrate in volume and velocity and flow into a natural depression, draw, swale, or other drainageway lose their character as diffused surface waters.
5. _____. A lower landowner may not obstruct waters which have collected and concentrated in volume and velocity from flowing through a natural depression, draw, swale, or other drainageway.
6. _____. The alteration of a natural drainageway for diffused surface waters is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances presented.
7. **Constitutional Law: Political Subdivisions Tort Claims Act: Eminent Domain: Damages: Actions.** When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
8. **Constitutional Law: Demurrer: Pleadings: Eminent Domain.** As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Reversed and remanded for further proceedings.

Raymond E. Baker of Law Offices of Raymond E. Baker, P.C., for appellants.

William T. Wright of Jacobsen, Orr, Nelson & Wright, P.C., for appellee County of Merrick, and Daniel D. Jewell of Jewell, Gatz & Collins, for appellee County of Platte.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiffs-appellants, Marion Slusarski and Conrad Slusarski, challenge the dismissal of their petition following the

sustainment of the separate demurrers of defendants-appellees, the Counties of Merrick and Platte. We reverse and remand for further proceedings.

The operative second amended petition asserts that Merrick and Platte Counties are "bodies politic," declares compliance with the relevant provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), as a condition precedent to bringing suit, and alleges that the Slusarskis are the lessees of a certain section of land in Merrick County which they farm and on which they had planted and cultivated certain crops. The petition further avers that the counties "jointly own and are responsible for a public road" abutting the east edge of the Slusarski leasehold, which road "acted as a dike" and prevented the flow of waters resulting from "rains, springs, or melting snows" across the leasehold, thereby flooding and damaging the Slusarskis' crops. Additionally, the petition states the aforesaid waters were not part of a watercourse or lake, and charges that but for the road said waters were "wont to flow in an easterly direction" across the Slusarski leasehold. The petition alleges the conduct of the two counties was "intentional," "unnecessary," and "unreasonable."

The counties take the position that the Slusarskis' operative petition fails to state a cause of action. In resolving this appeal we are bound by the rule that pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled. See *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Moreover, a demurrer which challenges the sufficiency of the allegations is a general one, *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965), in ruling on which a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. See, *Ambroz v. Cornhusker Square Ltd.*, *post* p. 899, 416 N.W.2d 510 (1987); *Bard v. Cox Cable of Omaha, Inc.*, *ante* p. 880, 416 N.W.2d 4 (1987); *Standard Federal Savings & Loan Assn. v. Meins*, *ante* p. 853, 415 N.W.2d 462 (1987); *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986).

In *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962), this court determined, on appeal following a trial on the merits, that an upper proprietor was entitled to a mandatory injunction compelling the lower proprietor to remove the earthen embankment the latter had erected along a boundary of his land, where waters collected and concentrated in volume and "flowed in a state of nature" through a depression or drainageway. *Id.* at 309, 113 N.W.2d at 201. In so holding, this court determined that the waters in question were not diffused surface waters and announced that

> diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. The proper rule in such cases is generally stated in 56 Am. Jur., Waters, § 75, p. 562, as follows: "The great weight of authority, however, is to the effect that both under the civil-law rule as to surface waters and under the so-called 'common-law' or 'common enemy' rule, a natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein, and that this is a continuing duty."

Id. at 306, 113 N.W.2d at 200.

In *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985), the landowners claimed that a bridge built by the county obstructed the drainage of waters which collected on their lands, and sought to enjoin continuation of the obstruction and to have the former drainageway restored. In affirming the dismissal of the landowners' action after a trial on the merits, this court noted that the landowners had the burden of proving

that a drainageway existed before the county made its alteration, that the drainageway was formed and existed in a state of nature, and that the drainageway carried water from a higher to a lower estate. We concluded that since the landowners failed to prove the drainageway was a natural one, they had failed to meet their burden of proof.

More recently, in *Johnson v. NM Farms Bartlett, ante* p. 680, 414 N.W.2d 256 (1987), we said that the alteration of a natural drainageway for diffused surface waters is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances presented. Accord *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985). See, also, *Nickman v. Kirschner*, 202 Neb. 78, 273 N.W.2d 675 (1979); *Arthur v. Glover*, 82 Neb. 528, 118 N.W. 111 (1908).

The petition before us alleges the waters in question, but for the road, were "wont to flow in an easterly direction." The inference to be drawn from the words "wont to flow," giving them the liberal construction required, is that there existed a natural drainageway, that is, one occurring in a state of nature.

The petition informs us the waters in question arose from rains, springs, or melting snows; they thus began as diffused surface waters. *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980). Whether they retained their character as such is unknown, for the petition does not state whether at some point the waters collected and concentrated in volume and velocity. However that may be, the petition nonetheless states a cause of action in tort. If the waters retained their character as diffused surface waters, the counties were free, as lower proprietors, to dam them, provided the interests of good husbandry were served thereby, it was necessary to do so, and it was reasonable under all the circumstances presented. But the petition asserts the damming was not necessary and was done unreasonably. If the waters collected and concentrated in volume and velocity, they lost their character as diffused surface waters, and the counties were not privileged to obstruct their flow through the natural drainageway.

Moreover, the petition states a second cause of action. It

must be inferred from the facts alleged that the counties own and maintain the road for a public use. The plaintiffs in *Parriott v. Drainage Dist. No. 6, ante* p. 123, 410 N.W.2d 97 (1987), brought an action seeking damages as the result of flooding caused by the defendant drainage district's alleged negligence in failing to maintain a ditch in proper repair. In reversing the dismissal of the action following the sustainment of the defendant district's demurrer, we held that notwithstanding the fact that plaintiffs had failed to state a tort action in negligence against the district because they had failed to allege compliance with the Political Subdivisions Tort Claims Act, they had nonetheless stated an action for compensation under the provisions of the Nebraska Constitution. We observed that when a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation. We further said that as article I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language. Accord, *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977).

The judgment of the district court dismissing the petition is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

W & K FARMS, INC., APPELLANT, V. HI-LINE FARMS, INC., AND AARON R. WALTER, APPELLEES.

416 N.W.2d 10

Filed November 25, 1987. No. 86-068.

1. **Final Orders: Appeal and Error.** Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
2. _____: _____. An order which is not final ordinarily is not an appealable order.
3. **Judgments: Final Orders: Pleadings: Time.** An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
4. **Pleadings: Time.** As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Appeal dismissed.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Richard L. Spittler, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Plaintiff has appealed from an order of the district court, which denied its motion for 6 additional days to file a second amended petition. It assigns as error that (1) the trial court erred in finding an order entered by it on August 16, 1985, was a self-executing order; (2) the trial court erred by vacating on its own motion an earlier order entered directing the defendant to file a responsive pleading to plaintiff's second amended petition; and (3) the trial court erred by overruling plaintiff's motion to cure default by extending the time in which to file a second amended petition by 6 days.

This case is a procedural nightmare, brought about by the simple expediency of counsel's ignoring or failing to abide by the time restrictions ordered by the court. In addition, the transcript consists of two parts, making it extremely difficult to

follow the sequential filings and progression of this case in any logical order.

The plaintiff filed a petition on April 9, 1985, against the defendants, Hi-Line Farms, Inc., and Aaron R. Walter, as president, sole stockholder, and sole assignee of the corporation's assets. The petition sought collection of a promissory note.

An April 25, 1985, special appearance by Hi-Line was sustained for the reason that the corporation had been dissolved for nonpayment of taxes. The demurrer of Aaron Walter was filed on April 26. On May 17 the court sustained both the special appearance and the demurrer, and plaintiff was given 20 days to file an amended petition.

Some *32* days later, on June 18, an amended petition was filed by the plaintiff without having attempted to obtain special leave of the court until that date, and which was sought, apparently, in response to a motion for dismissal.

Defendant Walter then filed, on July 25, 1985, an extensive motion to strike certain portions of the amended petition, which was sustained by the court on August 16, by order filed on August 19, granting plaintiff "20 days to file its Second Amended Petition and upon its failure to do so, this matter shall stand dismissed." Plaintiff filed a second amended petition on September 11, again without special leave of the court, which was some *6* days after the deadline imposed by the court.

On October 23, "in control[ling] its own docket," the court opened the file to the last pleading—the second amended petition—and in its own motion directed Walter to file a responsive pleading within 20 days. Walter then filed, on November 12, within that court-directed timeframe, a special appearance, served on plaintiff on November 8, on the theory that the court's *self-executing* order of August 16, which required plaintiff to file its second amended petition within 20 days, had not been complied with, and therefore the action stood dismissed as of September 5.

On November 26 plaintiff filed a motion for the extension of the time to file its second amended petition "six days from Thursday, September 5, 1985 to Wednesday, September 11,

1985." It was supported by affidavit of counsel that although the order directing plaintiff to file a second amended petition was entered on August 16, counsel did not receive a copy of the order until August 19; that counsel calculated the 20 days' deadline from August 19, rather than August 16 (a discrepancy of 3 days, not 6 days); and that the pressures of other work and a heavy amount of dictation prevented the plaintiff's amended pleading from being "transcribed until September 9" and did not permit it to be "mailed for filing until September 10." As a matter of fact, it was not received by the clerk's office, located in the same city as the office of plaintiff's counsel, until September 11.

The matter becomes more confusing. On the trial docket, the judge's notes of December 13, 1985, vacated and set aside the court's order of October 23 directing defendant to file a responsive pleading; the special appearance (of Walter) filed November 12 was sustained; the motion (of plaintiff) filed November 26 for an order extending the time to file a second amended petition was overruled; the special appearance of Hi-Line Farms, Inc., filed December 11 (which does not appear in the transcript) was sustained because Hi-Line Farms previously had been dissolved; and the special appearance of defendant Walter to the petition filed November 26 (neither pleading appearing in the transcript) was overruled, and said defendant was given 20 days to plead to "said petition to vacate and set aside." Finally, on January 17, 1986, the judge's order (entered after the notice of appeal was filed) shows that the demurrer of the defendant Walter (not shown of record) was overruled, and he was given 20 days to answer, presumably the petition to vacate.

It is difficult to discern from just what the plaintiff is appealing. The notice of appeal mentions only the order overruling its motion for extension of time in which to file an amended pleading. Generally, such an order is not final because it does not dispose of the whole merits of the case and does leave something for the further consideration of the court. *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). Considering only the notice of appeal, plaintiff's action in prosecuting this appeal is premature because there has been

no judgment or final order in the court from which an appeal may be taken. *Federal Land Bank of Omaha v. Johnson, ante* p. 877, 415 N.W.2d 478 (1987). Such a conclusion would leave us with no alternative but to dismiss the appeal as premature.

However, plaintiff insists in its argument that because the trial court determined that its order of August 16 granting plaintiff a time certain in which to file an amended pleading, failing which the action stood dismissed, was a self-executing order, it had no jurisdiction to grant further relief. Therefore, plaintiff argues, the effect of that finding was that as of September 5 plaintiff's action was dismissed. If September 5 was the effective date of a dismissal order, a notice of appeal filed on January 13, 1986, by the plaintiff would be substantially beyond the statutory limitation, and this court acquires no jurisdiction.

Finally, we address the question of whether, in fact, the trial court's order was self-executing so as to cause a dismissal of the proceedings. We have held as recently as *Federal Land Bank of Omaha v. Johnson, supra*, that an order such as this, allowing a plaintiff a certain amount of time in which to plead further and, failing that, the case is automatically dismissed, is a conditional judgment only. " '[A] conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.' " *Id.* at 879, 415 N.W.2d at 479-80.

The trial court could have denied plaintiff's motion for extension of time, which it did, and then order the action dismissed for failure to comply with the court's earlier order. That would have left no doubt in anyone's mind as to the finality of the order. We would then be called upon to determine whether, in dismissing the action rather than granting additional time to plead, the trial court acted within its proper discretion in imposing such a sanction so as to prevent undue delays and avoid congestion of the trial docket. *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978).

There being no final, appealable order, the appeal is dismissed.

APPEAL DISMISSED.

JOHN R. AMBROZ, APPELLANT, V. CORNHUSKER SQUARE LIMITED, A LIMITED PARTNERSHIP, APPELLEE.

416 N.W.2d 510

Filed November 25, 1987. No. 86-189.

1. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
2. _____: _____. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
3. **Polygraph Tests: Employer and Employee.** The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
4. **Termination of Employment.** When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee for whatever cause it chooses without incurring liability.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

James D. McFarland of Steven D. Burns, P.C., for appellant.

Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

The question presented in this case is whether an employee, whose contract of employment is a hiring at will, has a cause of action against his employer who terminates the employment in violation of Neb. Rev. Stat. § 81-1932 (Reissue 1981) because the employee refused to submit to a polygraph examination.

The plaintiff, John R. Ambroz, was employed as a security guard by the defendant, Cornhusker Square Limited. The plaintiff's duties were to maintain building security at the Cornhusker Hotel in Lincoln, Nebraska, but did not involve public law enforcement.

The amended petition alleges that on May 7, 1985, the director of security of the defendant demanded that the plaintiff take a truth and deception (polygraph) examination by 4 p.m. that day or his employment would be terminated. The plaintiff refused to take the examination and as a result was wrongfully discharged by the defendant. The amended petition specifically alleges: "The only reason for termination of Plaintiff's employment was that Plaintiff declined to submit to a truth and deception examination as he was entitled to do under the Truth and Deception Examiners Act, Neb. Rev. Stat. §§81-1901 et seq. (Reissue 1981)." The amended petition prays for reinstatement to the position of security guard and for damages. According to the plaintiff's brief, his theory of the case is that it is a common-law tort action for wrongful discharge.

The defendant's general demurrer to the amended petition was sustained, and the petition was dismissed. The plaintiff has appealed.

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Overman v. Brown*, 220 Neb. 788, 372 N.W.2d 102 (1985), citing *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986); *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986); *Reimer v. K N Energy*, 223 Neb. 142, 388 N.W.2d 479 (1986); and *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986), and consider only the facts set forth in the petition, *Abboud, supra.*

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981 & Cum. Supp. 1984), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.

Section 81-1932 (Reissue 1981) provides:

> No employer or prospective employer may require as a condition of employment or as a condition for continued

employment that a person submit to a truth and deception examination unless such employment involves public law enforcement. This shall not be construed to prohibit such employer from asking an employee or applicant to submit to a truth and deception examination if:

(1) No questions are asked during the truth and deception examination concerning the examinee's sexual practices, labor union, political or religious affiliations, or marital relationships;

(2) The examinee is given written and oral notice that the examination is voluntary and that the examinee may discontinue the examination at any time;

(3) The employer or prospective employer has the employee or applicant sign a form stating that the examination is being taken voluntarily;

(4) Questions that are asked prospective employees are job related;

(5) Prospective employees are not preselected for a truth and deception examination in a discriminatory manner;

(6) An employee is only requested to submit to a truth and deception examination if such examination concerns itself with a specific investigation;

(7) The results of a truth and deception examination are not the sole determinant in the termination of employment; and

(8) All questions that are asked during a truth and deception examination and the responses of the examinee are kept on file by the employer for a period of one year.

Section 81-1935 (Reissue 1981) provides:

Except as provided in section 81-1932, any person who violates the provisions of sections 81-1901 to 81-1936 or who falsely states or represents that he or she is or has been an examiner or intern shall be guilty of a Class II misdemeanor.

The amended petition alleges that the contract of employment was oral and for an hourly wage. It does not allege that the plaintiff was hired for a definite period of time. In *Jeffers v. Bishop Clarkson Memorial Hosp., supra*, we held

that "when employment is not for a definite term and *there are no contractual or statutory restrictions upon the right of discharge*, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability." (Emphasis in original.) 222 Neb. at 832, 387 N.W.2d at 695, citing *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985); *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982).

In somewhat related cases, we have recognized a constitutional restriction upon the discharge of governmental at-will employees. Although governmental at-will employees may be discharged for no reason at all, they may not be discharged on a basis that infringes upon constitutionally protected interests. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986). See, also, *Devine v. Dept. of Public Institutions*, 211 Neb. 113, 317 N.W.2d 783 (1982); *Nebraska Dept. of Roads Emp. A. v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973); *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983), *appeal after remand* 787 F.2d 1245 (8th Cir. 1986).

The plaintiff argues that in this case, there is a "statutory restriction" upon the defendant's right to discharge the plaintiff, which creates an exception to the at-will rule. In *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we recognized that other jurisdictions have adopted public policy exceptions to the rule. We stated at 316, 299 N.W.2d at 151:

> We recognize, however, that the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.

In *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 833, 387 N.W.2d 692, 695 (1986), we stated:

> Except in cases where an employee is deprived of constitutional or *statutory rights* or where contractual

> agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination. See, e.g., *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982); *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981).

(Emphasis supplied.)

Ambroz argues that he was discharged for *refusing* to participate in an activity which is protected under § 81-1932. The relevant portion of the statute provides: "No employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination unless such employment involves public law enforcement." We believe the statute is a pronouncement of public policy on the issue of wrongful discharge.

Although 1980 Neb. Laws, L.B. 485, was introduced "to provide procedures, standards, and rules for the licensing of persons who claim to be able to detect truth and/or deception through the use of mechanical instrumentation," Committee Statement, Miscellaneous Subjects Committee, 86th Leg., 2d Sess. (Mar. 29, 1979) (statement of Dave Newell, chairman), the introducer's statement of intent specifically stated, "The bill also regulates the use of truth and deception devices in employment situations. Any employer requiring an employee or applicant, as a condition of employment or continued employment, to take a truth and deception test shall be guilty of a Class II misdemeanor." Introducer's Statement of Intent, 86th Leg., 2d Sess. (Feb. 9, 1979) (statement of Dave Newell, chairman and principal introducer).

From the legislative history of § 81-1932, it is apparent that the Nebraska Legislature was promulgating public policy. The statute speaks for itself in language that is clear and unambiguous and specifically prohibits an employer's use of the polygraph to deny employment.

In *Strahl v. Miller*, 97 Neb. 820, 824, 151 N.W. 952, 953 (1915), we said:

> The law seems to be well settled that, when a statute

> commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide.

The decisions from other jurisdictions are not unanimous.

Where there is no statute on the matter, the cases generally hold that an employee at will has no cause of action for wrongful discharge because he refused to submit to a truth and deception examination. L. Larson & P. Borowsky, Unjust Dismissal § 7.05 (1987). But in cases involving a statute similar to § 81-1932, a number of courts have held that the statute creates an exception to the common-law rule and permits an employee who is discharged in violation of such a statute to recover damages from the employer.

In *Townsend v. L.W.M. Management, Inc.*, 64 Md. App. 55, 494 A.2d 239 (1985), a case involving a statute similar to § 81-1932, the court held that it would " 'recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy,' " 64 Md. App. at 60, 494 N.W.2d at 242, and that "[t]he source of the 'clear mandate of public policy' may be found in legislative enactments . . . . In any case, the public policy found must be 'sufficiently clear to provide the basis for a tort or contract action for wrongful discharge.' [291 Md.] at 42, 432 A.2d 464." 64 Md. App. at 61, 494 A.2d at 242.

Molush v. Orkin Exterminating Co., Inc., 547 F. Supp. 54 (E.D. Pa. 1982), involved a similar factual situation. In the *Molush* case the court held at 56:

> A discharged employee may have a cause of action against his employer when the employer exercises his otherwise absolute right to terminate the employment relationship in

> a manner which contravenes or undermines an important public policy. . . . Such a public policy has been found by courts to be embodied in Pennsylvania's anti-polygraph statute. Courts have upheld tort actions for wrongful discharge of employees for their refusal to submit to polygraph examinations . . . and upheld actions for wrongful discharge based on the results of a polygraph examination allegedly required as a condition of continued employment. . . .

See, also, *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Heller v. Dover Warehouse Market, Inc.*, 515 A.2d 178 (Del. Super. 1986); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (1985); Annot., 12 A.L.R.4th 544 (1982).

Unlike the plaintiff in *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986), the plaintiff in this case was discharged, not merely demoted.

This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

We conclude that the order of the district court sustaining the demurrer of the defendant was erroneous.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROGER D. TODD, APPELLANT.
416 N.W.2d 13

Filed November 25, 1987. No. 86-1086.

Trial: Evidence: Appeal and Error. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas J. Garvey and Charles E. Dorwart, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

The defendant, Roger D. Todd, appeals from his convictions by a jury of burglary, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), a Class III felony, and theft, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1983), a Class III felony, Neb. Rev. Stat. § 28-518(1) (Reissue 1985). The defendant appeals, assigning two errors: (1) that the district court erred in allowing the defendant to be cross-examined with respect to a misdemeanor conviction and (2) that the district court erred in overruling the defendant's motion for a new trial. For the reasons set out below, we affirm.

The record reveals that in the early morning hours of May 27, 1986, John Slettedahl heard the sound of a car engine running outside his open bedroom window. Looking out his window, Slettedahl observed a copper-colored pickup truck, with the engine running, parked on the corner of a street north of his home. He next observed two men emerge from an adjoining field and place a long white sofa in the back of the pickup truck. Slettedahl recognized one of the men loading the furniture into the truck as the defendant. He knew the defendant as a neighbor and as one who used the same babysitter used by Slettedahl. Slettedahl then went back to bed.

The same morning, after arising, he looked out his window

at the model home across the street and noted that he could not see the white couch which was normally visible through the window at the front of the model home. The back door of the model home was standing open, and the furniture was missing. Slettedahl then contacted the police.

After the police officers interviewed Slettedahl, a search for the missing furniture was conducted at the defendant's home the following day. The missing furniture was not found. The investigation revealed that the missing furniture in the model home had been leased and had a retail value in excess of $6,000. The defendant was arrested later that afternoon.

In an amended complaint the defendant was charged, in two counts, with burglary and theft, as set out above. Defendant pled not guilty, and the matter was set for trial on September 24, 1986.

On the second day of the trial, after the defense had started its case but before the defendant took the stand, an in-chambers meeting was held on the record. Some discussions in the meeting, however, were "held off the record." The judge and counsel for both parties were present, but the defendant was not. At the in-chambers meeting, the prosecutor indicated that he intended to use the defendant's prior shoplifting conviction in his rebuttal case "for the purpose of prior bad acts or for credibility." The defendant's police record revealed that he had been arrested on May 19, 1985, for shoplifting, after he was seen taking a bottle of cologne at a department store. The defendant had pled guilty to that offense. The use of the prior theft conviction was generally discussed, and the court stated, "My initial thought is that it's [the prior conviction] probably admissible, but I suppose that, you know, if the defendant wants, he's entitled to a limiting instruction at that time that it's being received not to — not as bearing on his credibility." Later, the court said, "But I think the State's probably entitled to produce the evidence of the prior. It's so close in time and it certainly involves an intent to deprive the owner of the property, petty larceny." Defendant's counsel responded, "That by itself, yeah." The prosecutor then stated that while he had said he intended to use the prior conviction during rebuttal, he meant to use it during his cross-examination of defendant. The

court then stated, "I think you can do it by cross-examination. . . . Again assuming that, you know, assuming his testimony is essentially that, I'm paraphrasing, 'But I'm a nice guy. I didn't do anything other than dump some grass clippings.' " Defendant's counsel indicated his disapproval of the prosecutor's change of trial tactics, but made no objection then, or at any other time during the in-chambers discussion, to the State's use of the fact of defendant's prior conviction.

The trial then resumed before the jury. Defendant testified in his case that while he might have been in the area the night of the burglary, he had not committed the burglary. Subsequently, during cross-examination, the defendant was asked if he had "ever been convicted of a theft . . . within the last 12 months . . . ." Defendant admitted to the shoplifting conviction. The State's attorney continued to cross-examine defendant as to the incident. Defendant's counsel made no objection to this line of questioning except for one objection to a question if the prior conviction was the same thing defendant was accused of in the trial. Defense counsel's objection to that particular question was sustained on the ground it called for a legal conclusion. Defendant's counsel went into the details of the prior conviction on his redirect. On September 25, 1986, the jury found the defendant guilty of the counts of both burglary and theft. Defendant timely filed a motion for a new trial. The motion was denied. Defendant was sentenced to 1 to 3 years in the Department of Correctional Services on each count, with the sentences to run concurrently.

We first consider the defendant's assignment of error that the district court erred in allowing the defendant to be cross-examined as to a prior misdemeanor conviction.

We need not consider, in the circumstances of this case, whether the prior conviction was admissible under either Neb. Rev. Stat. § 27-609(1)(b) or § 27-404(2) (Reissue 1985). The Nebraska Evidence Rules provide that error may not be predicated on a ruling which admits evidence unless a timely objection appears of record, stating the specific ground of objection, if a specific ground is not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)). It is well-settled by this court that if a party does not

make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). As we have said above, no objection was made to the testimony in question.

In his brief at 4, defendant contends that defense counsel (different than appellate counsel) "made his objection and argument at the time of the in-chambers discussion to the use of the prior conviction and said objection at that time is sufficient to permit Appellant to raise this issue on appeal . . . ." Our examination of the record shows the issue was discussed but that no general or specific objection was made to the use of the prior conviction.

The instant case is different procedurally from *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982), cited by defendant. In that case, defendant moved for an order of the court directing that Williams' prior misdemeanor convictions could not be used in the trial by the State. Clearly, Williams objected to the testimony, and the court clearly ruled, " '[T]he State will be permitted to bring the misdemeanor convictions out . . . on cross examination.' " *Williams, supra* at 861-62, 326 N.W.2d at 679. In this case there was never an objection made, nor was there a prior ruling. The court said that if certain testimony were adduced, the prior conviction might be admissible. In the context of this case, defendant could not rely on the discussion in chambers, or on the court's statements as to how the evidence might be treated, to preserve the question on appeal.

In his second assignment of error, defendant contends that the court erred in overruling defendant's motion for a new trial. The granting of a motion for a new trial lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985). The trial court did not abuse its discretion in overruling the defendant's motion for a new trial.

The judgment and sentences of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANNE M. VESELY, APPELLANT.
415 N.W.2d 786

Filed November 25, 1987. No. 87-074.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, and Patrick A. Campbell, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Defendant, age 17 years, was charged with and convicted of operating a motor vehicle while under the influence of alcoholic liquor or while having ten-hundredths of 1 percent or more by weight of alcohol in her body fluid (DWI). This appeal concerns only the denial of her county court pretrial motion to transfer her case to the jurisdiction of the juvenile court. Neb. Rev. Stat. § 43-261 (Cum. Supp. 1986). Defendant claims that the trial court abused its discretion in finding a sound basis for retaining jurisdiction.

We have reviewed the entire record and find no abuse of discretion on the part of either the trial court denying the motion or the district court, sitting as an appellate court, affirming the county court's decision.

AFFIRMED.

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In re Interest of J.K.B. and C.R.B. 701
In re Interest of P.J.M., R.E.M., and S.A.M. 764
In re Interest of Z.R. 770

18. Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
In re Interest of T.C. 116

19. The findings and conclusions of the trial court in an action at law tried without a jury will not be set aside unless they are clearly wrong.
Washington Heights Co. v. Frazier 127

20. In an action at law tried without a jury, it is not the province of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, the court presumes that the trial court resolved any controverted facts in favor of the successful party, and considers the evidence and all permissible inferences therefrom most favorably to that party.
Washington Heights Co. v. Frazier 127

21. The Nebraska Supreme Court has an obligation to reach independent conclusions on questions of law.
Washington Heights Co. v. Frazier 127
Pallas v. Black 728

22. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

23. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
In re Application U-2 594

24. An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
In re Interest of R.A. 160

25. Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
State v. Schreck 172
State v. Jacobs 184
State v. Carter 636

26. It is not the province of this court on appeal of a conviction to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Schreck 172
State v. Jacobs 184

27. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
State v. Schreck 172
State v. Moore 347
In re Interest of C.W. 719

28. A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
State v. Jacobs 184

29. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Jacobs 184

30. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184

31. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195

32. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
Cain v. Cain 203

33. A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
Bittner v. Miller 206

34. An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
Bittner v. Miller 206

35. The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
Bittner v. Miller 206

36. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
Hughes v. Enterprise Irrigation Dist. 230
Johnson v. NM Farms Bartlett 680
Pallas v. Black 728

37. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
Hughes v. Enterprise Irrigation Dist. 230

38. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
State v. Cottingham 270

39. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

40. In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
State v. Cottingham 270

41. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270

42. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275

43. A party cannot complain of error when, by his own action, he has acquiesced therein.
Shadow Isle, Inc. v. Granada Feeding Co. 325

44. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
Bergman v. Anderson 333

45. A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
State v. Dwyer 340

46. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Moore 347
State v. Parsons 543
State v. Williams 647
State v. Thomte 659
State v. Newson 867
State v. Charron 871

47. A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
State v. Rivers 353

48. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Rivers 353

49. A generalized and vague assignment of error that does not advise the Nebraska Supreme Court of the issue submitted for decision will not be considered.
Meis v. Grammer 360

50. Consideration of an appeal to the Nebraska Supreme Court is limited to the errors assigned and discussed.
Meis v. Grammer 360
In re Interest of Z.R. 770
51. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396
52. In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
Rahmig v. Mosley Machinery Co. 423
53. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
Rahmig v. Mosley Machinery Co. 423
54. A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
State ex rel. S.B. v. Dybdall 473
55. The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.
State ex rel. S.B. v. Dybdall 473
56. The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Bay v. House 521
57. A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
Bay v. House 521
58. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.
Parker v. St. Elizabeth Comm. Health Ctr. 526
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737
59. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
Parker v. St. Elizabeth Comm. Health Ctr. 526

60. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538

61. The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

62. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567

63. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567

64. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
State v. Reed 575

65. In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Matz 581

66. In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
Hroch v. City of Omaha 589

67. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to

interpret it in a manner consistent with the Constitution.
In re Application U-2 594
68. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
69. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
Third Party Software v. Tesar Meats 628
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
70. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
71. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636
72. This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
State v. Carter 636
73. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636
74. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Carter 636
75. Error without prejudice does not provide a ground for the reversal of a criminal conviction.
State v. Tully 651
76. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651
77. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
78. In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to

determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
In re Application of Silvey Refrig. Carr. 668

79. Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
Johnson v. NM Farms Bartlett 680

80. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
W & K Farms v. Hi-Line Farms 895

81. Error without prejudice forms no basis for appellate relief.
In re Interest of J.K.B. and C.R.B. 701

82. On a review of a record de novo, the Nebraska Supreme Court ignores improperly admitted evidence.
In re Interest of J.K.B. and C.R.B. 701

83. An action for specific performance is an equitable matter triable de novo on appeal to this court.
Pallas v. Black 728

84. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.
Thom v. Lutheran Medical Center 737

85. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
Omaha Mining Co. v. First Nat. Bank 743

86. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

87. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743

88. The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.
Omaha Mining Co. v. First Nat. Bank 743

89. In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, it presumes that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

90. An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
In re Interest of Z.R. 770

91. The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
State v. Hinton 787

92. The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Hinton 787

93. The language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts.
State v. Warren 810

94. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
In re Estate of West 813

95. Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.
Luschen Bldg. Assn. v. Fleming Cos. 840

96. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

97. Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
W & K Farms v. Hi-Line Farms 895

98. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Arrests

The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Moore 347

Assault

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
2. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
3. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333

Attorney and Client

1. It is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved.
Koch v. Koch 305
2. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492
3. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492

Attorneys at Law

1. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
   In re Estate of West 813
2. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
   In re Estate of West 813

Attorney Fees

1. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
   In re Claim of Rehm and Faesser 107
2. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
   In re Claim of Rehm and Faesser 107
3. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
   In re Claim of Rehm and Faesser 107

Battery

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
   Bergman v. Anderson 333
2. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
   Bergman v. Anderson 333
3. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
   Bergman v. Anderson 333

Blood, Breath, and Urine Tests

1. *Miranda* warnings are not required prior to an officer's request of

a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666
2. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666
3. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.
Heusman v. Jensen 666

Breach of Contract

1. A suit for the claimed breach of a contract presents an action at law.
Washington Heights Co. v. Frazier 127
2. Where a party's breach by nonperformance contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
Shadow Isle, Inc. v. Granada Feeding Co. 325
3. A party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.
Chadd v. Midwest Franchise Corp. 502
4. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition.
Chadd v. Midwest Franchise Corp. 502
5. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.
Chadd v. Midwest Franchise Corp. 502
6. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
Chadd v. Midwest Franchise Corp. 502
7. The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
Chadd v. Midwest Franchise Corp. 502
8. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Chadd v. Midwest Franchise Corp. 502
9. An action for breach of a lease presents an action at law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

10. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Brokers

For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
Tylle v. Zoucha 476

Burglary

1. An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Matz 581
2. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
State v. Matz 581
3. Burglary does not require an actual theft or asportation of property.
State v. Matz 581

Case Disapproved

County of Boone v. Armstrong, 23 Neb. 764, 37 N.W. 626 (1888), is expressly disapproved.
In re Claim of Rehm and Faesser 107

Case Overruled

1. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
2. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable

alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

Child Support

1. Modification of child support is an issue entrusted to the sound discretion of the trial court.
Dobbins v. Dobbins 465
2. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
Dobbins v. Dobbins 465
3. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
Dobbins v. Dobbins 465
4. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Dobbins v. Dobbins 465
5. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.
Dobbins v. Dobbins 465
6. Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
State of Iowa ex rel. Petersen v. Miner 551
7. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Circumstantial Evidence

1. Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Nesbitt 32
2. One accused of a crime may be convicted on the basis of

circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt; the State is not required to disprove every hypothesis but that of guilt.
State v. Jacobs 184
3. Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
State v. Miller 576
4. A person charged with a crime may be convicted on circumstantial evidence only.
State v. Matz 581

Constitutional Law

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
State v. Miller 576
2. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123
3. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.
In re Application A-15738 146
4. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
In re Application A-15738 146
5. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
State v. Schreck 172
State v. Moore 347
In re Interest of C.W. 719
6. In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172
7. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172
8. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by

common understanding and practice, the Constitution requires no more.
State v. Schreck 172
9. Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
10. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
11. Courts must apply and must enforce the Constitution as it is written.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
12. Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
13. If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
14. The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
15. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
16. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
17. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
18. The Constitution, as amended, must be read as a whole.
Banner County v. State Bd. of Equal. 236
19. The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
Banner County v. State Bd. of Equal. 236

20. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
Banner County v. State Bd. of Equal. 236
21. In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.
Banner County v. State Bd. of Equal. 236
22. A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.
Banner County v. State Bd. of Equal. 236
23. The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
Banner County v. State Bd. of Equal. 236
24. Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
Meis v. Grammer 360
25. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.
Meis v. Grammer 360
26. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
Meis v. Grammer 360
27. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
Meis v. Grammer 360
28. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
Meis v. Grammer 360
29. The guarantee of equal protection of the laws requires that the

state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.
Meis v. Grammer 360
30. Fourth amendment rights are personal rights, which may not be vicariously asserted.
State v. Smith 419
31. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
32. A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
33. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
34. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
Craig v. Logemann 587
35. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589
36. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594
37. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
In re Application U-2 594

38. The entrapment defense is not mandated by either the state or federal Constitution.
State v. Bocian 613

39. Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
Heusman v. Jensen 666

40. The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Hinton 787

41. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
In re Estate of West 813

42. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
In re Estate of West 813

43. Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
Bard v. Cox Cable of Omaha, Inc. 880

44. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

45. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889

Contracts

1. Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter.
   Sesostris Temple Golden Dunes v. Schuman 7
2. The meaning of an unambiguous contract presents a question of law.
   Washington Heights Co. v. Frazier 127
3. If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.
   Washington Heights Co. v. Frazier 127
4. Parol evidence is admissible to explain vague language contained in a written contract.
   Washington Heights Co. v. Frazier 127
5. A contract provision is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
   Shadow Isle, Inc. v. Granada Feeding Co. 325
   Luschen Bldg. Assn. v. Fleming Cos. 840
6. A lease is to be construed as any other contract.
   Chadd v. Midwest Franchise Corp. 502
7. The proper construction of a written contract is generally a question of law to be determined by the courts.
   Chadd v. Midwest Franchise Corp. 502
8. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable. Mutuality of obligation is an essential element of every enforceable agreement.
   Chadd v. Midwest Franchise Corp. 502
9. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
   Chadd v. Midwest Franchise Corp. 502
10. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
    Chadd v. Midwest Franchise Corp. 502
11. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
    Chadd v. Midwest Franchise Corp. 502
12. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
    Chadd v. Midwest Franchise Corp. 502
13. Where, in a suit on a contract, the plaintiff's evidence establishes

acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.
Stremmel v. Kinney 555

14. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680

15. The construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.
Luschen Bldg. Assn. v. Fleming Cos. 840

16. That two parties urge opposing interpretations of a contract does not necessarily indicate the document is ambiguous.
Luschen Bldg. Assn. v. Fleming Cos. 840

17. When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

18. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
Luschen Bldg. Assn. v. Fleming Cos. 840

Controlled Substances

Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
State v. Hinton 787

Convictions

1. Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Nesbitt 32
State v. Jacobs 184

2. When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
State v. Nesbitt 32
State v. Schreck 172
State v. Williams 647
State v. Thomte 659
State v. Newson 867
State v. Charron 871

3. In determining whether evidence is sufficient in a jury trial to sustain a conviction, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury.
State v. Jacobs 184

4. In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.
State v. Dwyer 340
State v. Williams 647

5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Moore 347

6. In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Matz 581

7. A person charged with a crime may be convicted on circumstantial evidence only.
State v. Matz 581

Corporations

Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
Standard Federal Savings & Loan Assn. v. Meins 853

Counties

1. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
In re Claim of Rehm and Faesser 107
2. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
In re Claim of Rehm and Faesser 107
3. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
In re Claim of Rehm and Faesser 107

Courts

1. Courts must apply and must enforce the Constitution as it is written.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
2. A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
Frerichs v. Nebraska Harvestore Sys. 220
3. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
Craig v. Logemann 587
4. When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

5. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

Criminal Law

1. Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
State v. Jensen 40
2. The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40
3. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."
State v. Masilko 45
4. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Masilko 45
5. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
6. As a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment.
In re Claim of Rehm and Faesser 107
7. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
In re Claim of Rehm and Faesser 107
8. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
In re Claim of Rehm and Faesser 107
9. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat.

§ 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
In re Claim of Rehm and Faesser 107

10. Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Schreck 172

11. In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172

12. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172

13. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
State v. Schreck 172

14. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
State v. Jacobs 184

15. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

16. Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).
State v. Dwyer 340

17. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547

18. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547

19. The punishment for a criminal act should in all circumstances be commensurate with the offense.
State v. Bocian 613

20. Error without prejudice does not provide a ground for the reversal

of a criminal conviction.
State v. Tully 651
21. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
22. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
23. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
In re Interest of Richter 874
24. "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
In re Interest of Richter 874

Damages

1. The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
Sesostris Temple Golden Dunes v. Schuman 7
Shadow Isle, Inc. v. Granada Feeding Co. 325
2. The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
Sesostris Temple Golden Dunes v. Schuman 7
3. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123
4. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
5. Negligence is actionable only when it results in damages.
Bittner v. Miller 206
6. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213

7. Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery.
Shadow Isle, Inc. v. Granada Feeding Co. 325
8. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Chadd v. Midwest Franchise Corp. 502
9. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
10. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680
11. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
12. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743
13. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

Debtors and Creditors

1. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
Graff v. Burnett 710
2. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of

cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
Graff v. Burnett 710
3. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
Graff v. Burnett 710
4. Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.
Graff v. Burnett 710
5. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850
6. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Decedents' Estates

1. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813
2. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813
3. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical

matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Declaratory Judgments

1. In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
2. In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
3. Ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
4. The availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
5. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Demurrer

1. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
2. In considering a demurrer, a court accepts as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
3. Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
4. A demurrer which challenges the sufficiency of the allegations is a general one.
Slusarski v. County of Platte 889

5. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889
6. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Ambroz v. Cornhusker Square Ltd. 899
7. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
Ambroz v. Cornhusker Square Ltd. 899

Directed Verdict

1. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275
2. In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.
State v. Dwyer 340
State v. Williams 647
3. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
Rahmig v. Mosley Machinery Co. 423
4. Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
Rahmig v. Mosley Machinery Co. 423

5. If there is any evidence which will sustain a finding for the party against whom the motion for a directed verdict is made, the case may not be decided as a matter of law.
Jones v. Malloy 559

Discrimination

1. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
2. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
3. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
4. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195

Divorce

Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
Cain v. Cain 203

Drunk Driving

1. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
State v. Slezak 404
2. Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
State v. Miller 576
3. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for

investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659
4. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
State v. Thomte 659

Due Process

1. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589
2. A proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
In re Interest of J.K.B. and C.R.B. 701

Effectiveness of Counsel

This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. Additionally, the defendant must show that there is a reasonable probability that but for the attorney's error the result of the case would have been different.
State v. Rivers 353

Electricity

1. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295
2. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and

prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
3. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
4. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295
5. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295
6. The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Eminent Domain

1. There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
International Mov. & Stor. v. City of Lincoln 213
2. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213
3. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889
4. As Neb. Const. art. 1, § 21, is self-executory, a petition alleging

that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889

Employer and Employee

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
Ambroz v. Cornhusker Square Ltd. 899

Employment Security Law

1. Appeals under the provisions of Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984) are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
Tuma v. Omaha Public Power Dist. 19
2. Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
Tuma v. Omaha Public Power Dist. 19
3. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
Tuma v. Omaha Public Power Dist. 19
4. Failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
Tuma v. Omaha Public Power Dist. 19

Entrapment

1. The entrapment defense is not mandated by either the state or federal Constitution.
State v. Bocian 613
2. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613

Equal Protection

The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.

Meis v. Grammer 360

Equity

1. In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.

Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50

2. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Hughes v. Enterprise Irrigation Dist. 230
Johnson v. NM Farms Bartlett 680
Pallas v. Black 728

3. A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.

Evertson v. Cannon 370

4. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.

Graff v. Burnett 710

5. An action for specific performance is an equitable matter triable de novo on appeal to this court.

Pallas v. Black 728

6. If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.

Pallas v. Black 728

7. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.

In re Estate of West 813

8. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
9. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813

Escape

When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547

Evidence

1. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it.
Bell v. Williams Care Center 1
2. The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
State v. Nesbitt 32
State v. Ryan 59
Turner v. Welliver 275
State v. Carter 636
3. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
State v. Nesbitt 32
4. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
State v. Ryan 59
5. Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
State v. Ryan 59
6. In determining the appropriate sentence, evidence as to a

defendant's life, character, and previous conduct is highly relevant.
State v. Schreck 172

7. The seriousness of the offense is an important factor in imposing a sentence.
State v. Schreck 172

8. Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
State v. Jacobs 184

9. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
State v. Jacobs 184

10. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184

11. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213

12. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

13. Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
Turner v. Welliver 275

14. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275

15. Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. Smith 419

16. The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.
State ex rel. S.B. v. Dybdall 473

17. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
Bay v. House 521

18. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543

19. In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
Hroch v. City of Omaha 589

20. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636

21. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
State v. Carter 636

22. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636

23. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Carter 636

24. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722

25. Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.
State v. Warren 810

26. Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace or settle a controversy without respect to

legal liability, is not admissible against the person making it.
Luschen Bldg. Assn. v. Fleming Cos. 840
27. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Expert Witnesses

1. The admission of opinion testimony of an expert is generally discretionary with the trial court.
Bell v. Williams Care Center 1
2. Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
In re Interest of T.C. 116
3. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
Turner v. Welliver 275
4. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
Turner v. Welliver 275
5. The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Bay v. House 521
6. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538
7. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
Nice v. IBP, inc. 538
8. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
Jones v. Malloy 559
9. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559

Final Orders

1. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the

court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
W & K Farms v. Hi-Line Farms 895
2. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877
3. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
Federal Land Bank of Omaha v. Johnson 877
4. Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
W & K Farms v. Hi-Line Farms 895
5. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895

Fire Protection Districts

If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50

Foreclosure

1. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
Graff v. Burnett 710
3. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying

the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850
4. Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
Standard Federal Savings & Loan Assn. v. Meins 853

Foreign Judgments

1. Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
State of Iowa ex rel. Petersen v. Miner 551
2. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Franchises

Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
Bard v. Cox Cable of Omaha, Inc. 880

Fraud

1. The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
3. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

4. To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.
Pawnee County Bank v. Droge 314
5. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
In re Estate of West 813
6. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
7. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813
8. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813
9. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence

of an abuse of discretion.
In re Estate of West 813
10. *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
In re Estate of West 813
11. As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
In re Estate of West 813
12. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
In re Estate of West 813
13. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
In re Estate of West 813

Guaranty

1. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492
2. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Habeas Corpus

Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.
Anderson and Hochstein v. Gunter 724

Health Care Providers

1. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559
2. Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
   Jones v. Malloy 559
3. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
   Jones v. Malloy 559
4. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
   Jones v. Malloy 559
5. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
   Jones v. Malloy 559
6. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
   Jones v. Malloy 559
7. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
   Jones v. Malloy 559
8. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
   Jones v. Malloy 559

Hearsay

1. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial

authorities have made a good faith effort to obtain the witness' presence at trial.
State v. Carter 636
2. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636

Homicide

1. Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.
State v. Parsons 543
2. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
State v. Williams 647
3. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.
State v. Williams 647
4. Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651
5. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.
State v. Ward 809

Impeachment

Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.
Rahmig v. Mosley Machinery Co. 423

Implied Consent

1. *Miranda* warnings are not required prior to an officer's request of

a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666
2. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666
3. Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
Heusman v. Jensen 666
4. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
5. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.
Heusman v. Jensen 666
6. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Indictments and Informations

The district court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
State v. Aldrich 645

Informed Consent

1. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
Jones v. Malloy 559
2. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
Jones v. Malloy 559

3. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559
4. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
Jones v. Malloy 559

Initiative and Referendum

The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176

Injunction

1. A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief.
Hughes v. Enterprise Irrigation Dist. 230
2. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230
3. The purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe that there will be a resumption of the violations or activities.
Johnson v. NM Farms Bartlett 680

Insurance

Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
Turner v. Welliver 275

Intent

1. If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.
Washington Heights Co. v. Frazier 127
2. Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Schreck 172

3. The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
4. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
5. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
6. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
7. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
Evertson v. Cannon 370
8. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
9. An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Matz 581
10. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
State v. Matz 581
11. Burglary does not require an actual theft or asportation of property.
State v. Matz 581
12. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594

13. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
In re Application U-2 594
14. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
State v. Williams 647
15. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.
State v. Williams 647

Investigative Stops

1. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
2. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
3. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659

Invitor-Invitee

While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
Tiede v. Loup Power Dist. 295

Joint Ventures

1. A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance

and control of the agencies used therein, though one may entrust performance to the other.
Evertson v. Cannon 370
2. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
Evertson v. Cannon 370
3. A joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law.
Evertson v. Cannon 370
4. The existence of a joint venture is a question of fact.
Evertson v. Cannon 370
5. The existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, but it alone is not generally sufficient.
Evertson v. Cannon 370

Judges

Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
Johnson v. NM Farms Bartlett 680

Judgments

1. A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
Frerichs v. Nebraska Harvestore Sys. 220
2. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270
3. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
Parker v. St. Elizabeth Comm. Health Ctr. 526
4. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
Third Party Software v. Tesar Meats 628
5. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no

jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
6. Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.
Luschen Bldg. Assn. v. Fleming Cos. 840
7. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877
8. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
Federal Land Bank of Omaha v. Johnson 877
9. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895

Judicial Notice

1. A court must take judicial notice of its own records in the case under consideration.
In re Interest of R.A. 160
2. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270
3. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396
4. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
5. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
6. Courts take judicial notice of the public and general acts of Congress.
Standard Federal Savings & Loan Assn. v. Meins 853

Juries

1. A jury verdict may not be set aside unless clearly wrong, and it is

sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
Bell v. Williams Care Center 1
2. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime.
State v. Ryan 59
3. To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
State v. Jacobs 184
4. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
5. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
6. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
7. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195
8. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
Chadd v. Midwest Franchise Corp. 502
9. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
Chadd v. Midwest Franchise Corp. 502
10. The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
Chadd v. Midwest Franchise Corp. 502
11. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
Bay v. House 521
12. When the terms of the contract are in dispute and the real

intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

Jurisdiction

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
   State v. Ryan 59
2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
   State v. Ryan 59
3. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
   State v. Reed 575
4. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
   Craig v. Logemann 587
5. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
   Ernest v. Jensen 759
6. The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
   Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Juror Qualifications

1. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
   State v. Jacobs 184
2. Under the provisions of Neb. Rev. Stat. § 25-1636 (Reissue 1985), it is not a "cause of challenge that a juror has read in the

newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement."
State v. Jacobs 184
3. A party who fails to challenge prospective jurors for disqualification and passes them for cause waives any objection to their selection as jurors.
Bittner v. Miller 206
4. A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Jurors

1. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
Rahmig v. Mosley Machinery Co. 423
2. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
Rahmig v. Mosley Machinery Co. 423

Jury Instructions

1. Where it appears that the trial court's response to a question from the jury could not result in prejudice to any of the parties, the presence of the parties or their counsel is unnecessary.
Sesostris Temple Golden Dunes v. Schuman 7
2. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
Professional Recruiters v. Oliver 16
3. The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.
State v. Ryan 59
4. All of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
State v. Ryan 59
5. In instructions to the jury, fragments, though open to criticism

when considered by themselves, are not necessarily prejudicial to the complaining party if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.
International Mov. & Stor. v. City of Lincoln 213

6. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
Bergman v. Anderson 333
7. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613
8. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743
9. The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.
Omaha Mining Co. v. First Nat. Bank 743

Jury Trials

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
State v. Miller 576
2. A demand for a jury trial by a defendant is necessary to invoke the statutory right to a jury trial.
State v. Miller 576

Juvenile Courts

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
State v. Ryan 59
2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical

rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
State v. Ryan 59
3. As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263
4. Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
In re Interest of R.A. 160

Leases

1. A lease is to be construed as any other contract.
Chadd v. Midwest Franchise Corp. 502
2. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
Chadd v. Midwest Franchise Corp. 502
3. An action for breach of a lease presents an action at law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
4. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Legislature

1. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
2. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
Banner County v. State Bd. of Equal. 236
3. A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
4. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

5. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
In re Application U-2 594
6. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
In re Application U-2 594
7. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
8. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813
9. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813
10. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Lesser-Included Offenses

Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651

Liability

1. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140

2. There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
International Mov. & Stor. v. City of Lincoln 213

3. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
Turner v. Welliver 275

4. As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
Bergman v. Anderson 333

5. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680

6. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680

7. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the

damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
8. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Libel and Slander

1. In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer or speaker to give the information.
Turner v. Welliver 275
2. Where a qualified privilege exists, there can be no recovery without proof of malice.
Turner v. Welliver 275
3. Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
Turner v. Welliver 275
4. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
Turner v. Welliver 275
5. Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
Turner v. Welliver 275
6. Generally, whether a publication was a privileged one is a question of law to be determined by the court.
Turner v. Welliver 275
7. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
Turner v. Welliver 275
8. As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
Turner v. Welliver 275
9. Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
Turner v. Welliver 275
10. A defamatory communication may consist of a statement in the

form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
Turner v. Welliver 275

11. A communication between those sharing a common interest is conditionally privileged.
Turner v. Welliver 275

Licensee

The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
Moseman v. L & P Investment Co. 677

Licenses and Permits

1. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice should be sent to the last address of the licensee as shown by the files of the department.
State v. Moderow 470

2. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666

3. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Liens

1. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
Graff v. Burnett 710

2. When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
Graff v. Burnett 710

Limitations of Actions

1. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
   Tylle v. Zoucha 476
2. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559

Livestock

1. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
   Graff v. Burnett 710
2. When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
   Graff v. Burnett 710

Malpractice

1. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559
2. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
   Jones v. Malloy 559
3. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
   Jones v. Malloy 559
4. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
   Jones v. Malloy 559
5. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
   Jones v. Malloy 559

Mandamus

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.
Larson v. City of Omaha 751

Medical Malpractice

A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Mental Competency

1. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Tully 651
2. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
State v. Tully 651
3. Mental retardation does not necessarily imply incompetence to plead or stand trial.
State v. Tully 651
4. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651

Minors

1. The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40
2. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
Cain v. Cain 203
3. If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

4. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
5. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
6. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Miranda Rights

Miranda warnings are not required prior to an officer's request of a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666

Modification of Decree

1. Modification of child support is an issue entrusted to the sound discretion of the trial court.
Dobbins v. Dobbins 465
2. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
Dobbins v. Dobbins 465
3. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
Dobbins v. Dobbins 465
4. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Dobbins v. Dobbins 465
5. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.
Dobbins v. Dobbins 465

Mortgages

1. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
   Keith County Bank v. Wheat Belt Pub. Power Dist. 850
2. Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
   Standard Federal Savings & Loan Assn. v. Meins 853

Motions for Continuance

This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
State v. Carter 636

Motions for Mistrial

1. The decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
   State v. Nesbitt 32
   State v. Jacobs 184
   State v. Alvarado 195
2. A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
   State v. Jacobs 184
3. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
   State v. Johnson 618

Motions for New Trial

1. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
   State v. Cottingham 270
2. New evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome.
   State v. Cottingham 270

3. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743

Motions to Dismiss

1. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184
2. In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
Tiede v. Loup Power Dist. 295
3. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
Tiede v. Loup Power Dist. 295

Motions to Vacate

1. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
In re Estate of West 813
2. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
3. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813

4. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813

5. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
In re Estate of West 813

6. As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
In re Estate of West 813

7. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
In re Estate of West 813

8. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
In re Estate of West 813

Motor Carriers

1. In determining whether a carrier's operation in hauling goods between points in one state through another state is a subterfuge, courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or

dominant character of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling as to the outcome.
In re Application of Silvey Refrig. Carr. 668
2. A logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and does not indicate subterfuge to avoid state regulation.
In re Application of Silvey Refrig. Carr. 668
3. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668
4. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668
5. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668

Municipal Corporations

1. If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
2. Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
Bard v. Cox Cable of Omaha, Inc. 880
3. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
Bard v. Cox Cable of Omaha, Inc. 880

Names

Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and

heard the witnesses and accepted one version of the facts rather than the other.
Cain v. Cain 203

Nebraska Power Review Board

The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Negligence

1. The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
3. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
4. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140
5. Negligence is actionable only when it results in damages.
Bittner v. Miller 206
6. For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
Tiede v. Loup Power Dist. 295
7. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
Tiede v. Loup Power Dist. 295
8. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
Tiede v. Loup Power Dist. 295
9. A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a

particular standard of conduct toward another.
Tiede v. Loup Power Dist. 295
10. While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
Tiede v. Loup Power Dist. 295
11. The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril.
Tiede v. Loup Power Dist. 295
12. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295
13. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
14. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
15. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295
16. One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
Tiede v. Loup Power Dist. 295
17. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
Tiede v. Loup Power Dist. 295

18. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.
Tiede v. Loup Power Dist. 295

19. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295

20. If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

21. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

22. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

23. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

24. Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what a reasonably prudent person under the same circumstances would or should, in the exercise of reasonable care, have anticipated.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

25. In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the

question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
Rahmig v. Mosley Machinery Co. 423

26. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
Rahmig v. Mosley Machinery Co. 423

27. Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
Rahmig v. Mosley Machinery Co. 423

28. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
Rahmig v. Mosley Machinery Co. 423

29. Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
Rahmig v. Mosley Machinery Co. 423

30. Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
Rahmig v. Mosley Machinery Co. 423

31. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing

actions for professional negligence.
Tylle v. Zoucha 476
32. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492
33. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492
34. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
Moseman v. L & P Investment Co. 677
35. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680
36. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680

New Trial

1. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
Omaha Mining Co. v. First Nat. Bank 743
2. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Notice

1. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice

should be sent to the last address of the licensee as shown by the files of the department.
State v. Moderow 470
2. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589
3. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Obscenity

The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40

Ordinances

1. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270
2. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
State v. Jacobs 184
2. Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
State v. Jacobs 184

Parental Rights

1. In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to

the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
In re Interest of T.C. 116
In re Interest of C.C. 263
In re Interest of J.K.B. and C.R.B. 701
In re Interest of P.J.M., R.E.M., and S.A.M. 764
In re Interest of Z.R. 770

2. In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
In re Interest of T.C. 116
In re Interest of C.C. 263

3. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263

4. As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263

5. Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
In re Interest of R.A. 160
In re Interest of C.W. 719

6. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
In re Interest of R.A. 160
In re Interest of J.K.B. and C.R.B. 701

7. An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
In re Interest of R.A. 160

8. An order of termination of parental rights must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative.
In re Interest of R.A. 160
In re Interest of Z.R. 770

9. Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a

final disposition be made without delay.
In re Interest of R.A. 160
In re Interest of Z.R. 770
10. A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
In re Interest of R.A. 160
11. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.
In re Interest of R.A. 160
12. A child's future need not be subject to the risks of awaiting uncertain parental maturity.
In re Interest of R.A. 160
13. Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home.
In re Interest of R.A. 160
14. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
15. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701
16. In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
In re Interest of J.K.B. and C.R.B. 701
17. Where there is a need for a rehabilitation plan, a parent has not substantially complied with a reasonable court-ordered rehabilitation plan, the prognosis for rehabilitation is poor, and it is in the child's best interests that the parent's rights be terminated, such rights are to be terminated.
In re Interest of J.K.B. and C.R.B. 701
18. The order terminating parental rights must be supported by clear and convincing evidence and must also be in the best interests of the child.
In re Interest of P.J.M., R.E.M., and S.A.M. 764
19. The primary consideration in a termination proceeding is the best interests of the child. This standard means that the ultimate decision of the court, after sufficient evidence has been presented,

must be rendered in the best interests of the child.
In re Interest of Z.R. 770
20. An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
In re Interest of Z.R. 770
21. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. The past is an indication of the future.
In re Interest of Z.R. 770
22. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
In re Interest of Z.R. 770

Parol Evidence

Parol evidence is admissible to explain vague language contained in a written contract.
Washington Heights Co. v. Frazier 127

Parties

1. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
Turner v. Welliver 275
2. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
Koch v. Koch 305

Paternity

A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
State ex rel. S.B. v. Dybdall 473

Photographs

1. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the

photographs outweighs the possible prejudice to one accused of a crime.
State v. Ryan 59
2. Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.
State v. Parsons 543

Physician and Patient

A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Plea in Abatement

Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
State v. Schreck 172
State v. Jacobs 184
State v. Carter 636

Pleadings

1. A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
Bittner v. Miller 206
2. At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
Bittner v. Miller 206
3. The statute concerning amendments to pleadings should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
Bittner v. Miller 206
4. A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.
Frerichs v. Nebraska Harvestore Sys. 220
5. A defendant must prove all elements of an affirmative defense.
Pawnee County Bank v. Droge 314
6. Under a code system of pleading, such as that in Nebraska, it is not necessary to state a cause of action in any particular form. It is

only necessary to plead the facts, and not the theory of recovery.
Bergman v. Anderson 333
7. Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
In re Estate of Villwok 693
8. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
9. Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
10. A demurrer which challenges the sufficiency of the allegations is a general one.
Slusarski v. County of Platte 889
11. In ruling on a general demurrer, a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
Slusarski v. County of Platte 889
12. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889
13. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895
14. As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.
W & K Farms v. Hi-Line Farms 895
15. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Ambroz v. Cornhusker Square Ltd. 899
16. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
Ambroz v. Cornhusker Square Ltd. 899

Pleas

1. A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
   State v. Rivers 353
2. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
   State v. Slezak 404
3. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
   State v. Slezak 404
4. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
   State v. Tully 651
5. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
   State v. Tully 651
6. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
   State v. Tully 651
7. Mental retardation does not necessarily imply incompetence to plead or stand trial.
   State v. Tully 651
8. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
   State v. Tully 651
9. Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary.
   State v. Golden 863

Police Officers and Sheriffs

1. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief

the action was appropriate, then probable cause exists.
State v. Moore 347
2. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
3. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
State v. Thomte 659

Political Subdivisions Tort Claims Act

1. A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Parriott v. Drainage Dist. No. 6 123
2. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
Hughes v. Enterprise Irrigation Dist. 230
3. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

Polygraph Tests

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
Ambroz v. Cornhusker Square Ltd. 899

Postconviction

1. When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
State v. Rivers 353
2. A motion for postconviction relief may not be used to obtain

review of issues which could have been raised on direct appeal.
State v. Rivers 353
3. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Rivers 353
State v. Tully 651
4. Although an evidentiary hearing is not always necessary on an application for postconviction relief, such a hearing is usually advisable to avoid protracted litigation.
State v. Rivers 353
5. An evidentiary hearing on a postconviction motion is required upon an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right.
State v. Jackson 857

Presumptions

1. All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional.
Tylle v. Zoucha 476
2. Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
3. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
4. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543
5. Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
Jones v. Malloy 559
6. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
State v. Duff 567
7. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594

Pretrial Procedure

After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636

Principal and Agent

An attorney in fact has no implied or apparent authority to do that which the principal himself would not be authorized to do.
Zybach v. State 396

Prior Convictions

1. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404
2. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
State v. Slezak 404
3. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
State v. Johnson 618

Prisoners

1. Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
Meis v. Grammer 360
2. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.
Meis v. Grammer 360
3. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
Meis v. Grammer 360
4. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
Meis v. Grammer 360

5. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
Meis v. Grammer 360
6. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547
7. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547
8. Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.
Anderson and Hochstein v. Gunter 724

Probable Cause

1. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Moore 347
2. In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Duff 567
3. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
State v. Duff 567

4. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567
5. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567
6. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
7. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
8. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659
9. An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
State v. Hinton 787
10. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
State v. Hinton 787

Products Liability

1. In products liability, there is a significant distinction between a

manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
Rahmig v. Mosley Machinery Co. 423

2. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
Rahmig v. Mosley Machinery Co. 423

3. To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
Rahmig v. Mosley Machinery Co. 423

4. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
Rahmig v. Mosley Machinery Co. 423

5. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
Rahmig v. Mosley Machinery Co. 423

6. Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect.
Rahmig v. Mosley Machinery Co. 423

7. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
Rahmig v. Mosley Machinery Co. 423

8. A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect.
Rahmig v. Mosley Machinery Co. 423
9. In a products liability case, misuse is not an aspect of assumption of risk.
Rahmig v. Mosley Machinery Co. 423
10. Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
Rahmig v. Mosley Machinery Co. 423
11. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

Proof

1. The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
Sesostris Temple Golden Dunes v. Schuman 7
Shadow Isle, Inc. v. Granada Feeding Co. 325
2. The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
3. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
4. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to

render it impossible for him or her to be the guilty party.
State v. Jacobs 184
5. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
6. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
7. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195
8. At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
Bittner v. Miller 206
9. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230
10. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275
11. Where a qualified privilege exists, there can be no recovery without proof of malice.
Turner v. Welliver 275
12. As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
Turner v. Welliver 275
13. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
Tiede v. Loup Power Dist. 295
14. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
Tiede v. Loup Power Dist. 295
15. A defendant must prove all elements of an affirmative defense.
Pawnee County Bank v. Droge 314
16. In order to establish a defense of undue influence, the party

asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
Pawnee County Bank v. Droge 314
17. To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.
Pawnee County Bank v. Droge 314
18. To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
Rahmig v. Mosley Machinery Co. 423
19. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
Rahmig v. Mosley Machinery Co. 423
20. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
Rahmig v. Mosley Machinery Co. 423
21. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
Rahmig v. Mosley Machinery Co. 423
22. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable

alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

23. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492

24. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492

25. The burden of proving exemption from taxation is on the party claiming such exemption.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

26. Where, in a suit on a contract, the plaintiff's evidence establishes acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.
Stremmel v. Kinney 555

27. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
Jones v. Malloy 559

28. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559

29. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
Jones v. Malloy 559

30. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613

31. Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing

constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651
32. One seeking postconviction relief bears the burden of establishing the basis for such relief.
State v. Tully 651
33. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
34. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668
35. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668
36. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668
37. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680
38. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
39. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of

frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680

40. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
In re Estate of Villwok 693

41. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
Graff v. Burnett 710

42. A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
Pallas v. Black 728

43. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813

44. Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.
State v. Charron 871

Property

1. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123

2. A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not

in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
Evertson v. Cannon 370

Prosecuting Attorneys

1. Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
State v. Jensen 40
2. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
3. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
4. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
5. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195

Proximate Cause

1. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
2. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
3. *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
Hughes v. Enterprise Irrigation Dist. 230

4. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230

Public Service Commission

1. In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
In re Application of Silvey Refrig. Carr. 668
2. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668
3. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668
4. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668

Public Utilities

1. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295
2. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
3. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
4. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295

5. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295
6. In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
Bard v. Cox Cable of Omaha, Inc. 880

Quo Warranto

Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
Bard v. Cox Cable of Omaha, Inc. 880

Rates

1. In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
Bard v. Cox Cable of Omaha, Inc. 880
2. Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
Bard v. Cox Cable of Omaha, Inc. 880
3. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
Bard v. Cox Cable of Omaha, Inc. 880
4. Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
Bard v. Cox Cable of Omaha, Inc. 880
5. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
Bard v. Cox Cable of Omaha, Inc. 880

Real Estate

1. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing

actions for professional negligence.
Tylle v. Zoucha 476
2. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728

Receivers

1. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850
2. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Records

1. A court must take judicial notice of its own records in the case under consideration.
In re Interest of R.A. 160
2. Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
In re Interest of R.A. 160
3. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

Rescission

1. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

Revocation

1. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's

implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
2. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Right to Counsel

1. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."
State v. Masilko 45
2. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Masilko 45
3. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404
4. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666
5. In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
In re Interest of J.K.B. and C.R.B. 701

Robbery

Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).
State v. Dwyer 340

Rules of Evidence

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
   State v. Jacobs 184
2. Under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985), relevant evidence is to be excluded if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.
   State v. Jacobs 184
3. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
   Turner v. Welliver 275
4. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
   Turner v. Welliver 275
5. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
   Turner v. Welliver 275
6. Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
   Rahmig v. Mosley Machinery Co. 423
7. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
   Rahmig v. Mosley Machinery Co. 423
8. Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.
   Rahmig v. Mosley Machinery Co. 423
9. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source

other than evidence presented at trial.
Rahmig v. Mosley Machinery Co. 423
10. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
Rahmig v. Mosley Machinery Co. 423
11. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
State v. Johnson 618
12. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
13. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701

Search and Seizure

1. Fourth amendment rights are personal rights, which may not be vicariously asserted.
State v. Smith 419
2. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722
3. In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
State v. Hinton 787
4. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.
State v. Hinton 787

Search Warrants

1. Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. Smith 419

2. In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Duff 567
3. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
State v. Duff 567
4. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567
5. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
State v. Duff 567
6. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567
7. In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
State v. Hinton 787
8. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.
State v. Hinton 787
9. Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.
State v. Warren 810

Second Injury Fund

1. If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the

employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
Parker v. St. Elizabeth Comm. Health Ctr. 526
2. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
Parker v. St. Elizabeth Comm. Health Ctr. 526

Security Interests

Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Sentences

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
2. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention.
State v. Ryan 59
3. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Ryan 59
State v. Schreck 172
State v. Miller 576
4. In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant.
State v. Schreck 172
5. The seriousness of the offense is an important factor in imposing a sentence.
State v. Schreck 172
6. The punishment for a criminal act should in all circumstances be commensurate with the offense.
State v. Bocian 613
7. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted

of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.
State v. Ward 809

Sexual Assault

1. In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact.
State v. Charron 871
2. Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.
State v. Charron 871

Specific Performance

1. An action for specific performance is an equitable matter triable de novo on appeal to this court.
Pallas v. Black 728
2. If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.
Pallas v. Black 728
3. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728
4. A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
Pallas v. Black 728
5. The mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith.
Pallas v. Black 728

Standing

1. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
In re Estate of West 813
2. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A

court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
In re Estate of West 813

Statute of Frauds

1. The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
Professional Recruiters v. Oliver 16
2. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680
3. A memorandum otherwise adequate to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984) need be signed only by the party to be charged.
Pallas v. Black 728
4. In order to satisfy the provisions of Neb. Rev. Stat. § 36-105 (Reissue 1984), a memorandum, in addition to being signed by the party to be charged or by his or her agent actually or apparently authorized to do so, must state with reasonable certainty, (1) each party to the contract either by his or her own name, or by such a description as will serve to identify him or her, or by the name or description of his or her agent, (2) the land, goods, or other subject matter to which the contract relates, and (3) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.
Pallas v. Black 728

Statutes

1. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146
2. In order for a defendant to challenge a statute on the ground of

vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172
3. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172
4. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
State v. Schreck 172
5. Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
6. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
7. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
8. The statute concerning amendments to pleadings should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
Bittner v. Miller 206
9. Neb. Rev. Stat. §§ 77-1502 and 77-1504 (Reissue 1986) were not repealed by 1985 Neb. Laws, L.B. 271.
Banner County v. State Bd. of Equal. 236
10. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
11. Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete and comprehensive act dealing with the matter of tax exemptions.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
12. As a series or collection of statutes pertaining to a certain subject

matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
In re Application U-2 594
13. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594
14. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
15. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
In re Interest of Richter 874
16. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
In re Interest of Richter 874

Summary Judgment

1. A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law.
Frerichs v. Nebraska Harvestore Sys. 220
Chadd v. Midwest Franchise Corp. 502
Moseman v. L & P Investment Co. 677
In re Estate of Villwok 693
Luschen Bldg. Assn. v. Fleming Cos. 840
2. A court may not enter summary judgment on an issue not presented by the pleadings.
Frerichs v. Nebraska Harvestore Sys. 220
3. Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
Chadd v. Midwest Franchise Corp. 502
Luschen Bldg. Assn. v. Fleming Cos. 840
4. In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
Moseman v. L & P Investment Co. 677
Luschen Bldg. Assn. v. Fleming Cos. 840

5. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
Luschen Bldg. Assn. v. Fleming Cos. 840

Taxation

1. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
2. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
3. The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
Banner County v. State Bd. of Equal. 236
4. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
5. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
6. Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
7. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
8. The burden of proving exemption from taxation is on the party claiming such exemption.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
9. Under Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984), an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, a new application, before a previously granted exemption has expired. Failure to make reapplication for

exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

10. Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete and comprehensive act dealing with the matter of tax exemptions.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

11. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813

12. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813

13. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Telecommunications

The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
Bard v. Cox Cable of Omaha, Inc. 880

Tender

1. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
   Graff v. Burnett 710
2. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
   Graff v. Burnett 710
3. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
   Graff v. Burnett 710
4. Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.
   Graff v. Burnett 710

Termination of Employment

When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee for whatever cause it chooses without incurring liability.
Ambroz v. Cornhusker Square Ltd. 899

Testimony

Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275

Time

1. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
   State v. Tully 651
2. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of

subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759
3. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895
4. As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.
W & K Farms v. Hi-Line Farms 895

Tort-Feasors

The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140

Torts

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
2. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
Bergman v. Anderson 333
3. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
4. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
5. As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
Bergman v. Anderson 333

Trial

1. The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
Sesostris Temple Golden Dunes v. Schuman 7
2. The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
State v. Nesbitt 32
Turner v. Welliver 275
3. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
State v. Nesbitt 32
4. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
State v. Ryan 59
5. Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
In re Interest of R.A. 160
6. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
In re Interest of R.A. 160
In re Interest of J.K.B. and C.R.B. 701
7. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184
8. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
9. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195
10. An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
Bittner v. Miller 206
11. In order to establish reversible error due to a violation of a

sequestration order, the defendant must make a showing of prejudice.
State v. Cottingham 270
12. Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
Turner v. Welliver 275
13. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
Turner v. Welliver 275
14. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275
15. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
Turner v. Welliver 275
16. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
Turner v. Welliver 275
17. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275
18. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
19. In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
Rahmig v. Mosley Machinery Co. 423
20. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
Rahmig v. Mosley Machinery Co. 423

21. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543
22. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547
23. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547
24. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
25. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636
26. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
State v. Tully 651
27. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Tully 651
28. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
State v. Tully 651
29. Mental retardation does not necessarily imply incompetence to plead or stand trial.
State v. Tully 651
30. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651
31. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
32. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701

33. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Trusts

A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
Evertson v. Cannon 370

Undue Influence

In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
Pawnee County Bank v. Droge 314
In re Estate of Villwok 693

Uniform Commercial Code

1. Where a case has been tried on the theory that the Uniform Commercial Code is applicable, upon appeal it will be decided upon the same theory.
Sesostris Temple Golden Dunes v. Schuman 7
2. The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
Professional Recruiters v. Oliver 16
3. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Valuation

1. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
2. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural

purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
3. The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
Banner County v. State Bd. of Equal. 236

Vendor and Vendee

Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728

Venue

1. A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
State v. Jacobs 184
2. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Jacobs 184
3. To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
State v. Jacobs 184
4. The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
State v. Jacobs 184
5. The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
Bittner v. Miller 206

Verdicts

1. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the

benefit of inferences reasonably deducible from it.
Bell v. Williams Care Center 1
2. A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
Bell v. Williams Care Center 1
3. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Jacobs 184
State v. Parsons 543
4. A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
State v. Dwyer 340
5. A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
Bay v. House 521
6. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Waiver

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
State v. Ryan 59
2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
State v. Ryan 59
3. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404

4. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722

Waters

1. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
In re Application U-2 594
2. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.
In re Application A-15738 146
3. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
In re Application A-15738 146
4. The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water.
In re Application A-15738 146
5. The second characteristic of the appropriative right of water in a natural stream is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.
In re Application A-15738 146
6. Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
In re Application A-15738 146
7. Although there may be some unappropriated water available at a proposed diversion point, the existence of a dependable water supply is essential to the success of any irrigation project and where, on the average, but an insignificant supply of water in relation to the maximum demand of the proposed appropriator is available, there is not a source of unappropriated water at the proposed diversion site.
In re Application A-15738 146
8. For a quantity of unappropriated water to be available at a proposed diversion point, it must be available in a supply which is

fairly continuous and dependable.
In re Application A-15738 146
9. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146
10. In order to be able to assess the impact on the public interest of a proposed project for the diversion of water, the project's design must be definite enough to reflect its impacts and implications to generally apprise the public of the efficacy of the proposed use of the planned facility and of its potential impact.
In re Application A-15738 146
11. Where the evidence supports the proposition that the benefits to the state would be greatly enhanced by using the available unappropriated water in the river of its origin, rather than to divert it to another river basin, a denial of such transbasin diversion is demanded by the public interest.
In re Application A-15738 146
12. Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1984), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
In re Application U-2 594
13. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680
14. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
Johnson v. NM Farms Bartlett 680
15. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that

this is done in a reasonable and careful manner and without negligence.
Johnson v. NM Farms Bartlett 680
16. Waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
Johnson v. NM Farms Bartlett 680
17. The alteration of natural drainage is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.
Johnson v. NM Farms Bartlett 680
Slusarski v. County of Platte 889
18. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680
19. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
20. Diffused surface waters which collect and concentrate in volume and velocity and flow into a natural depression, draw, swale, or other drainageway lose their character as diffused surface waters.
Slusarski v. County of Platte 889
21. A lower landowner may not obstruct waters which have collected and concentrated in volume and velocity from flowing through a natural depression, draw, swale, or other drainageway.
Slusarski v. County of Platte 889

Wills

1. Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
In re Estate of Villwok 693

2. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
In re Estate of Villwok 693
3. Testamentary capacity is tested by the state of a testator's mind at the time the will is executed.
In re Estate of Villwok 693
4. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
In re Estate of Villwok 693

Wiretaps

1. The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
State v. Hinton 787
2. An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
State v. Hinton 787
3. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
State v. Hinton 787
4. Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
State v. Hinton 787
5. Substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights.
State v. Hinton 787

Witnesses

1. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
State v. Ryan 59
2. In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
State v. Cottingham 270
3. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
Turner v. Welliver 275
4. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
State v. Johnson 618
5. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
State v. Carter 636
6. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636
7. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
State v. Thomte 659

Words and Phrases

1. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."
State v. Masilko 45

2. Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
State v. Ryan 59
3. A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Parriott v. Drainage Dist. No. 6 123
4. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
5. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
6. Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
In re Application A-15738 146
7. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146
8. *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
Hughes v. Enterprise Irrigation Dist. 230
9. Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
Turner v. Welliver 275
10. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is

one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
Turner v. Welliver 275
11. Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
Turner v. Welliver 275
12. A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
Turner v. Welliver 275
13. A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
Tiede v. Loup Power Dist. 295
14. One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
Tiede v. Loup Power Dist. 295
15. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
Tiede v. Loup Power Dist. 295
16. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.
Tiede v. Loup Power Dist. 295
17. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
18. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
Bergman v. Anderson 333
19. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
20. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an

apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
21. A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
Evertson v. Cannon 370
22. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
Rahmig v. Mosley Machinery Co. 423
23. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
Tylle v. Zoucha 476
24. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
Jones v. Malloy 559
25. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
Jones v. Malloy 559
26. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
In re Estate of Villwok 693
27. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of

cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
Graff v. Burnett 710
28. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
Graff v. Burnett 710
29. Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
30. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
31. *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
In re Estate of West 813
32. "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
In re Interest of Richter 874
33. The word "physical" describes that which has material, substantive, and objective existence.
In re Interest of Richter 874
34. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877

Workers' Compensation

1. If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that

portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
Parker v. St. Elizabeth Comm. Health Ctr. 526

2. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
Parker v. St. Elizabeth Comm. Health Ctr. 526

3. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.
Parker v. St. Elizabeth Comm. Health Ctr. 526
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

4. Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his or her previous occupation or in any other established field of employment for which he or she is fitted. Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.
Parker v. St. Elizabeth Comm. Health Ctr. 526

5. A worker should not be denied compensation benefits for what is currently total permanent disability simply because his or her employability and earning capacity might become enhanced by rehabilitation and the permanent disability possibly reduced at some time in the future.
Parker v. St. Elizabeth Comm. Health Ctr. 526

6. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538

7. The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

8. Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn

wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
9. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
10. While there is no numerical formula for determining one's earning power following an injury to the body as a whole, the percentage of body as a whole impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
Thom v. Lutheran Medical Center 737
11. Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986) permits an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.
Thom v. Lutheran Medical Center 737
12. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.
Thom v. Lutheran Medical Center 737